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No. 00-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

ROBIN LOVITT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the Supreme Court of Virginia erred and conflicted with decisions of other state supreme courts in holding that a jury may consider evidence of unadjudicated criminal conduct in sentencing a man to death, even if the government meets no burden of proof with respect to such evidence.

2. Whether the Supreme Court of Virginia committed additional important errors in affirming Robin Lovitt's conviction and sentence of death.

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Robin Lovitt and respondent Commonwealth of Virginia.

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INTRODUCTION

This petition presents a constitutional question of exceptional importance on which several state supreme courts are divided: whether a jury may consider evidence of unadjudicated criminal conduct in sentencing a man to death, even though he is supposed to be presumed innocent of those alleged crimes until proven guilty, and even though the government has met *no* burden of proof with respect to those alleged crimes. The Supreme Court of Virginia precludes the introduction of such evidence to impeach a prosecution witness, yet permits the prosecution to use it to condemn a man to death.

This controversial practice has led to a deep division in the state supreme courts. At least six states (including Virginia) hold that evidence of unadjudicated crimes is *per se* admissible in capital sentencing hearings; at least eight states hold that such evidence is *per se* inadmissible; and at least ten other states follow intermediate positions. The federal courts of appeals have also taken different approaches: the Ninth Circuit has held that such evidence must satisfy a threshold showing of reliability, while at least two other circuits have held that there is no constitutional bar to the admission of such evidence.

A number of the state supreme courts have based their conflicting rulings on conflicting interpretations of the federal constitution and this Court's precedents. Virginia and other states hold that evidence of unadjudicated crimes is admissible because this Court has held that "all relevant evidence" should be admitted in capital sentencing proceedings. Other states have limited the use of such evidence based on other precedents of this Court holding that because the death penalty is different, evidence unfavorable to the accused must satisfy a heightened standard of reliability in capital sentencing hearings. As several state supreme courts and commentators have emphasized, this Court's guidance is needed to reconcile its precedents.

The importance of doing so now cannot be overstated. As shown by the number of cases addressing this issue, prosecutors routinely rely on evidence of unadjudicated crimes at capital sentencings. Since 1985, the Supreme Court of Virginia alone has affirmed more than *25* death sentences based on its rule of *per se* admissibility. This practice strikes at the presumption of innocence. It is also unfairly prejudicial, because a jury that has already convicted a man of a capital crime – and is thus disposed to think the worst of him – is invited to sentence him to death based on unproven allegations of other bad acts. For petitioner Robin Lovitt, the Commonwealth's introduction of extensive evidence of unadjudicated crimes, and heavy reliance on such evidence in closing argument, may well make the difference between life and death absent this Court's review.

Five years ago, this Court granted *certiorari* to consider the question whether an individual petitioner had preserved the argument that the government's failure to provide advance notice of unadjudicated-crimes evidence used at trial violated his procedural due process rights. *See Gray v. Netherland*, 518 U.S. 152 (1996). If that procedural question is worthy of *certiorari*, the much more fundamental question presented here surely warrants this Court's attention. Especially given the frequency with which this issue recurs, this Court should settle it now, before others are sentenced to death in this manner.

OPINIONS BELOW

The decision of the Supreme Court of Virginia is reported at 537 S.E.2d 866 and reprinted in the Appendix ("App.") at 5a-29a. The unreported order denying rehearing is reprinted at App. 30a. The circuit court's order sentencing Mr. Lovitt to death is reprinted at App. 1a-4a.

JURISDICTION

The Supreme Court of Virginia issued its opinion on November 3, 2000, and denied Mr. Lovitt's timely petition for rehearing on January 12, 2001. On March 27, 2001, the Chief

Justice granted an extension of the time for filing this petition through and until May 14, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions applicable to this case are the Eighth and Fourteenth Amendments to the United States Constitution and sections 19.2-264.3 and 19.2-264.4 of the Code of Virginia. These provisions are reprinted in the Appendix at App. 31a-35a.

STATEMENT OF THE CASE

A. The Underlying Events and Guilt Phase of the Trial

On November 18, 1998, Clayton Dicks suffered a fatal injury when he was stabbed with a pair of scissors while working at a pool hall. *See* App. 6a. The cash register box and a pair of scissors usually kept behind the bar were missing. *See id.* at 8a. The scissors were later found outside the pool hall, *see* Va. J.A. 910-11, and the cash register box was found at the home of petitioner Robin Lovitt's cousin, Warren Grant, *see id.* at 1036-37.[1]

Four days later, Mr. Lovitt was arrested and indicted for robbery and murder during the commission of a robbery, in violation of Virginia Code §§ 18.2-31(4) and 18.2-58. *See* Va. J.A. 1-2. Mr. Lovitt entered a plea of not guilty, and has maintained his innocence to this date.

One of the two witnesses to the incident, Jose Alvarado, testified at trial that he saw a short man pushing a tall man behind the bar of the pool hall and making stabbing gestures with a silver-colored object. *See* Va. J.A. 796-799. He could *not* identify Mr. Lovitt as the assailant at the preliminary

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[1] "Va. J.A." refers to the Joint Appendix filed in the Supreme Court of Virginia.

hearing, and testified at trial that he was only "80 percent . . . sure it might be him." *Id.* at 808-812, 819. The other witness, Carlos Clavell, failed to appear for the preliminary hearing. At trial, he described the assailant as "between 25, 30, 45" years old, "black," and "five, five [to] five, seven." *Id.* at 834-837.

Other than the inconclusive testimony of these two witnesses, the Commonwealth relied on circumstantial evidence, including the testimony of three key witnesses: Mr. Lovitt's cousin, Mr. Grant; a forensic scientist, Carol Palmer; and an inmate, Casel Lucas. At trial, Mr. Grant testified that Mr. Lovitt brought the cash register box to his home on the night of the killing. He testified further that he helped Mr. Lovitt open the box and that he shared the money with Mr. Lovitt. *See* Va. J.A. 1029-34. Mr. Grant's fingerprints were found on the cash register box; Mr. Lovitt's were not. *See id.* at 1138.

Ms. Palmer performed certain DNA tests on blood from the tip and mid-section of the scissors that were believed to be the murder weapon. The blood on the tip did *not* match Mr. Lovitt's profile, and the blood on the mid-section was inconclusive as to Mr. Lovitt (and Mr. Grant). *See* App. 9a-10a. More sophisticated DNA testing was not performed.

Casel Lucas was housed with Mr. Lovitt in the Arlington County Jail after Mr. Lovitt's arrest. Mr. Lucas testified that he became friends with Mr. Lovitt in jail, and that Mr. Lovitt confessed that he took the cash register box and stabbed Mr. Dicks in order to avoid being identified. *See* App. 10a. Mr. Lucas admitted that he had thought he would "get something" in exchange when he offered this story to the police. *See* Va. J.A. 1254. He also admitted that he had previously received a plea bargain in return for his testimony that another inmate had similarly confessed to him. *See id.* at 1260-61. The trial court admitted a police officer's unusual testimony that Mr. Lucas had a reputation for truthfulness in the "police community." *See* App. 17a-18a.

The question for the jury in the guilt phase of the trial was whether Mr. Lovitt committed "[t]he willful, deliberate, and premeditated killing of any person" in the commission of a robbery. Va. Code § 18.2-31(4). There was no evidence that the assailant came to the scene with any weapon or intended to confront any person while taking the cash register box. The jury nonetheless returned a verdict of guilty on the capital murder and robbery charges. Va. J.A. 174-75.

B. The Sentencing Proceedings

The trial court then held a separate sentencing hearing before the same jury. *See* Va. Code § 19.2-264.4. During the penalty phase, the jury was asked to decide whether the Commonwealth had proven beyond a reasonable doubt that either: (1) "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society" (the "future dangerousness" aggravating factor); or (2) the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim" (the "vileness" aggravating factor). *Id.*(C). Under Virginia law, a jury may impose the death penalty if it finds that either the future dangerousness or the vileness aggravating factor is met. *Id.* In this case, the jury returned a death sentence based only on the future dangerousness aggravating factor. It did not find that the vileness aggravating factor was met. *See* Va. J.A. 176.

During the sentencing hearing, the Commonwealth sought to prove future dangerousness based in substantial part on evidence of prior unadjudicated conduct. Mr. Lovitt's counsel had filed a written motion to exclude such evidence in the sentencing phase of the trial. Va. J.A. 115-21. During the pretrial motions hearing, defense counsel had continued to argue that admitting such evidence would violate Mr. Lovitt's

due process rights, and that such evidence should be excluded. *See id.* at 252-53, 276-83. The trial judge denied the motion to exclude, noting counsel's exception to the ruling. *See id.* at 258.[2]

Accordingly, the Commonwealth did not limit itself to presenting Mr. Lovitt's record of convictions, but instead presented, over specific objection, Mr. Lovitt's records of unadjudicated conduct while in the custody of the Virginia Department of Juvenile Justice and the Virginia Department of Corrections. *See* Va. J.A. 1657-59, 2017-26. The Department of Corrections records accused Mr. Lovitt of: manufacturing weapons (shank handles), *id.* at 2031-33; possessing intoxicants and contraband, *id.* at 2027-29; assault and fighting, *id.*; and other misconduct. The juvenile records further accused Mr. Lovitt of fighting in class and causing another student to bleed, *id.* at 2018; theft and possession of contraband, *id.* at 2020, 2025; verbally and physically assaulting a fellow ward and bruising a corrections facility employee, *id.* at 2021-22; and slapping another ward in the face, *id.* at 2026. There was no testimony or support regarding these incidents; the unproven records were admitted as-is.

In addition to these records, the trial court also permitted several witnesses to testify about other unadjudicated conduct. Thus, Police Officer Jerome Lee testified that during a traffic stop in 1998, he noticed a long knife on the floor of the vehicle Mr. Lovitt was driving. *See* Va. J.A. 1635-36. Sergeant John McCarthy testified that in 1997, during the course of an arrest, he found a razor knife in Mr. Lovitt's pants pocket. *See id.* at 1629-30. Parole Officer Tony Reese testified that Mr. Lovitt tested positive for cocaine in 1990 while he was on parole. *See id.* at 1616-17. Parole Supervisor Alfreda Shinns testified that

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[2] In addition to its standing objection, the defense also raised specific objections to the Commonwealth's introduction of unadjudicated conduct as it was introduced at trial. *See* Va. J.A. 1631, 1657, 1662.

she referred Mr. Lovitt to substance abuse counseling in 1998, and that he refused to go. *See id.* at 1621-22.

In closing argument, the Commonwealth relied heavily and repeatedly on this evidence. *See* Va. J.A. 1712 (urging jury to consider an incident in which Mr. Lovitt was accused of "manufacturing shank handles in the penitentiary" in assessing future dangerousness); *id.* at 1719 ("I really ask that you look at the paperwork, because in fact there are more than one acts of violence listed in there."); *id.* at 1707-11 (referring to numerous juvenile offenses dating back to 1979); *id.* at 1711 (referencing "16 disciplinary violations" Mr. Lovitt accumulated in the Department of Corrections Facility).

In the post-sentencing hearing held after the jury returned its verdict, the Commonwealth continued to rely heavily on evidence of unadjudicated conduct. *See* Va. J.A. at 1797, 1799-800 (arguing that the testimony of Sergeant McCarthy and Officer Lee showed that Mr. Lovitt had a "propensity to self-arm"); *id.* at 1802-03 (arguing, based on Mr. Lovitt's disciplinary record while incarcerated, that "[h]e got into fights. There was an assault. He has possession of contraband, hitting other people and [being in] unauthorized areas."); *id.* at 1804 (emphasizing that Mr. Lovitt had "ten disciplinary actions taken" while he was incarcerated, including some for "possession of contraband, assault, having intoxicants and manufacturing shank handles"); *id.* at 1801-02 (referring to Mr. Lovitt's juvenile record and disciplinary record, and arguing that "he had intoxicants in both facilities. He was able to either make them or get them."); *id.* at 1862-66 (reviewing unadjudicated disciplinary reports with the judge). After the hearing, the trial judge entered his order sentencing Mr. Lovitt to death. *See id.* at 240.

C. The Virginia Supreme Court Proceedings

On direct appeal to the Virginia Supreme Court, Mr. Lovitt argued that his conviction and death sentence should be reversed for a number of reasons, including the admission of

evidence of prior unadjudicated conduct in the sentencing phase of the trial. Specifically, Mr. Lovitt argued that "the Virginia statute violates the Eighth and Fourteenth Amendments' heightened reliability requirement for capital sentencing because it allows the sentencer to prove the statutory aggravating factor of future dangerousness by evidence of unadjudicated criminal conduct." Opening Brief of Appellant at 25. Mr. Lovitt also argued that the Virginia scheme is especially unconstitutional because under Virginia law, such conduct need not even be proved by "any standard of proof before such conduct may be used." *Id.* In response, the Commonwealth relied on past precedent of the Virginia Supreme Court rejecting the argument that "[t]he future dangerousness aggravating factor unconstitutionally allows consideration of unadjudicated criminal acts." Brief of the Commonwealth at 16 (citing *Johnson v. Commonwealth*, 529 S.E.2d 769, 776 (Va.), *cert. denied*, 121 S. Ct. 432 (2000)). In his reply brief, Mr. Lovitt again argued that "as courts in most other states have concluded, the use of unadjudicated crimes in the penalty phase of a capital case violates the Eighth and Fourteenth Amendments, particularly when the defendant's supposed commission of those crimes is not subject to a high standard of proof." Reply Brief of Appellant at 7.

On November 3, 2000, the Supreme Court of Virginia affirmed Mr. Lovitt's conviction and sentence of death. The Court specifically rejected the "unadjudicated conduct" argument based on its prior precedents, stating that "[s]ince we find no reason to modify our previously expressed views, we reaffirm our earlier holdings and reject the following arguments . . . [t]he 'future dangerousness' aggravating factor unconstitutionally permits consideration of unadjudicated conduct." App. 13a-14a. The Court denied rehearing, without comment, on January 12, 2001. *See id.* at 30a.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF VIRGINIA ERRED AND CONFLICTED WITH DECISIONS OF OTHER STATE SUPREME COURTS IN PERMITTING THE JURY TO CONSIDER EVIDENCE OF ROBIN LOVITT'S UNADJUDICATED CRIMINAL CONDUCT IN SENTENCING HIM TO DEATH.

This Court should grant *certiorari* because the Supreme Court of Virginia erred and conflicted with decisions of other state supreme courts on the important question whether a jury may consider evidence of unadjudicated criminal conduct in sentencing a man to death, even if the government meets no burden of proof with respect to such evidence.

A. The State Supreme Courts Are Divided on the Admissibility of Evidence of Unadjudicated Criminal Conduct at Capital Sentencing Hearings.

The Supreme Court of Virginia relied on past precedent in rejecting Mr. Lovitt's constitutional challenge to the evidence of unadjudicated conduct. *See* App. 14a. As that precedent acknowledges, there is a "split of authority" on this issue. *Stockton v. Commonwealth*, 402 S.E.2d 196, 206 (Va. 1991). Virginia takes the extreme position that such evidence is *per se* admissible under the federal constitution because the jury should have before it "*all possible relevant information* about the individual defendant whose fate it must determine." *Watkins v. Commonwealth*, 331 S.E.2d 422, 436 (Va. 1985) (emphasis in original; internal quotation omitted). It therefore rejects not only the argument that such evidence is *per se* inadmissible, but also the arguments that such evidence at least implicates "the requirement of a greater degree of reliability where the death sentence is imposed," *Ramdass v. Commonwealth*, 437 S.E.2d 566, 569 (Va. 1993) (internal quotation omitted), *vacated on other grounds*, 512 U.S. 1217, *reinstated*, 450 S.E.2d 360 (1994), and must satisfy at least "some standard of proof," *Walker v. Commonwealth*, 515

S.E.2d 565, 571 (Va. 1999), *cert. denied*, 528 U.S. 1125 (2000).

One of the many commentators to address this issue undertook an exhaustive survey of the caselaw and determined that "[s]ix states allow the introduction of these offenses almost without limitation. Ten states allow the admission of the evidence, but only with certain limits or control mechanisms designed to safeguard the capital sentencing process. Finally, eight states flatly prohibit the introduction of extraneous unadjudicated offenses." Steven P. Smith, *Note, Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. Rev. 1249, 1250 (1993). Several of these states are in square conflict on the requirements of the federal constitution.

For example, the Supreme Court of Washington has held that "the admission of evidence of defendant's prior criminal activity (other than convictions) is inconsistent with . . . Eighth Amendment standards." *State v. Bartholemew*, 654 P.2d 1170, 1185 (Wash. 1982) ("*Bartholemew I*"), *vacated*, 463 U.S. 1203 (1983), *reinstated in relevant part*, 683 P.2d 1079, 1082 (Wash. 1984) ("*Bartholemew II*"). The court "based this . . . decision on our interpretation of the Supreme Court's decisions interpreting the Eighth and Fourteenth Amendments, and establishing procedural requirements in capital punishment cases." *Bartholemew II*, 683 P.2d at 1082.[3]

The Supreme Court of Washington relied in part on a similar holding by the Supreme Court of Indiana. *See State v. McCormick*, 397 N.E.2d 276, 279-80 (Ind. 1979). The Indiana court held, under the federal constitution, that "because of the

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[3] Under the Washington court's interpretation, the only exception is that such evidence may be admitted for impeachment or rebuttal purposes if the defendant opens the door to it; otherwise, it is *per se* excluded. *See Bartholemew I*, 654 P.2d at 1184-85; *State v. Lord*, 822 P.2d 177, 211-12 (Wash. 1992).

prejudice inherent in the sentencing procedure where the State alleges that the defendant committed another murder, regardless of whether he has been convicted of that other murder, and that other murder is not related to the principal charge, we hold that [the Indiana statute] denies due process as applied to this defendant. U.S. CONST. amend. XIV." *Id.* at 281 (internal quotation omitted).

The Supreme Court of Alabama likewise reversed a death sentence on this basis, holding that "the sentencing hearing did not comport with the constitutional standards outlined in [*Lockett v. Ohio*, 438 U.S. 586 (1978)]," in part because "the trial judge improperly considered evidence of a pending robbery charge." *Cook v. State*, 369 So. 2d 1251, 1252, 1257 (Ala. 1978) (plurality opinion). Although this holding came in a plurality opinion, the Alabama courts follow it as the opinion of "the Court." *See Waldrop v. State*, No. CR-98-2316, 2000 WL 869507, at *3 (Ala. Crim. App. June 30, 2000) (following *Cook* and reversing death sentence on this ground).

The Supreme Court of Tennessee likewise relied on *Bartholemew* and *McCormick* in holding that "to permit the State to present evidence sufficient to convince the jury beyond a reasonable doubt that the defendant had committed murders, for which he has not yet been convicted and before the very jury that has just returned a guilty verdict for first degree murder, violates the concept of fundamental fairness embodied in due process of law, subjecting a defendant to what is in effect a trial without the panoply of substantive and procedural protections afforded by the Tennessee Constitution." *State v. Bobo*, 727 S.W.2d 945, 952 (Tenn. 1987). Although the Supreme Court of Tennessee rested its holding on the state constitution, it stressed that the relevant constitutional provision "is synonymous with the 'due process' clause of the Fifth and Fourteenth Amendments to the Constitution of the United States." *Id.* (internal quotation omitted).

In addition to these states that exclude *per se* evidence of unadjudicated crimes on constitutional grounds, other states

require that such crimes be proved by a particular standard of proof before they may be considered by the jury. For example, the Supreme Court of Utah "decline[d] to adopt the Washington court's [*Bartholomew*] holding," but held that:

> *[a]llowing the sentencer to be influenced by material relating to crimes which have not been proven beyond a reasonable doubt would appear to violate the Supreme Court's ruling in [Gregg v. Georgia, 428 U.S. 153 (1976)] that evidence admitted during sentencing must not unfairly prejudice the accused.* In light of this concern, we hold that the sentencing body – be it judge or jury – may not rely on other violent criminal activity as an aggravating factor supporting a death penalty unless it is first convinced beyond a reasonable doubt that the accused did commit the other crime. This means that the State not only has the burden of persuading the sentencer beyond a reasonable doubt that the totality of the aggravating circumstances outweighs the totality of the mitigating circumstances . . . but also has the burden of proving to the sentencer beyond a reasonable doubt that the defendant actually committed the violent crime which is to be treated as an aggravating factor.

State v. Lafferty, 749 P.2d 1239, 1259-60 (Utah 1988) (emphasis added).

The Supreme Court of California likewise took issue with *Bartholemew* and *McCormick* in "reject[ing] defendant's argument that other crimes are inadmissible *per se* in a penalty trial." *People v. Balderas*, 711 P.2d 480, 516 (Cal. 1985). But like the Supreme Court of Utah, it went on to hold that another crime must be "proved beyond a reasonable doubt" if "the penalty jury is to consider [it] in deciding the appropriate punishment for the capital offense." *Id.*; *accord People v. Heishman*, 753 P.2d 629, 651 (Cal. 1988) (same).

For its part, the Supreme Court of Louisiana emphasized that "we are without firm guidance from the United States Supreme

Court . . . and the states are clearly divided in their approach" to this issue. *State v. Brooks*, 541 So. 2d 801, 812 (La. 1989). It then determined that evidence of unadjudicated crimes is admissible only if the trial court first determines by "clear and convincing evidence that defendant committed the other crimes." *Id.* at 814. In a subsequent decision, the court further limited the admissibility of such evidence by holding that only crimes involving "violence against the person of the victim" are admissible. *See State v. Jackson*, 608 So. 2d 949, 955 (La. 1992). It explained that this additional limitation is necessary "to insure that due process is not violated by the injection of arbitrary factors into the jury's deliberations and to prevent a confusing or unmanageable series of mini-trials of unrelated and unadjudicated conduct during the sentencing hearing." *Id.*

In addition to the conflict between these state supreme courts and the others that follow Virginia's view, there is also a conflict between the federal courts of appeals. At least two circuits, the Fifth and the Tenth, agree with Virginia that the Constitution imposes no limit on the admissibility of evidence of unadjudicated criminal conduct in capital sentencing hearings. *See Hatch v. Oklahoma*, 58 F.3d 1447, 1465 (10th Cir. 1995) ("holding that the admission of evidence of unadjudicated offenses at a sentencing proceeding does not violate due process"); *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987) ("we hold that the admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments"); *cf. Devier v. Zant*, 3 F.3d 1445, 1464-65 (11th Cir. 1993) (holding that the specific evidence at issue in that case was "sufficiently reliable" to be considered by the jury). In contrast, the Ninth Circuit has held that such evidence may be introduced only if it "has some minimal indicium of reliability beyond mere allegation." *McDowell v. Calderon*, 107 F.3d 1351, 1366 (9th Cir.) (internal quotation omitted), *reinstated in relevant part and vacated in other part*, 130 F.3d 833 (1997) (*en banc*).

The state supreme courts are not the only ones to have acknowledged this division of authority on the requirements of the federal constitution. The academic journals have also emphasized that:

- "[T]he twenty-four states considering the issue have adopted various constitutional positions on the issue, ranging from positive advocation to outright prohibition, with a vast, confused array of theories in between." Smith, *Unreliable and Prejudicial*, 93 Colum. L. Rev. at 1267.
- "[F]ederal circuits are at odds and there is little consensus in state courts" on the admissibility of "extraneous unadjudicated offenses as aggravating evidence in the penalty phase of capital trials." William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 360 (1995).
- "It is unclear what limitations, if any, due process places on the admissibility of evidence of unadjudicated crimes in capital sentencing hearings. The United States Supreme Court has not directly addressed this issue, and state courts have come to conflicting conclusions." John Herr, Note, *State v. Comeaux: Aggravating and Mitigating Factors in Capital Sentencing Hearings*, 72 Tul. L. Rev. 1447, 1448 (1998) (footnotes omitted).

B. The Courts' Division Is Based in Part on Differing Interpretations of this Court's Precedents.

The need for clear guidance from this Court is particularly acute because this conflict turns on differing interpretations of two lines of this Court's precedents, both of which date back to *Williams v. New York*, 337 U.S. 241, 244 (1949). The *Williams* Court addressed the "serious and difficult question" whether a sentencing *judge* could consider evidence of prior unadjudicated criminal conduct. *Id.* The Court answered that question in the affirmative. It first held that "modern concepts

of individualizing punishment" require a sentencing judge to consider "the fullest information possible concerning the defendant's life and characteristics." *Id.* at 247. It then held that this principle applied equally to all cases, including capital cases. *See id.* at 251-52.

During the overhaul in death penalty jurisprudence that began in the 1970s, however, this Court called the second *Williams* holding into doubt while expanding on the first. The Court explained that "[i]n 1949, when the *Williams* case was decided, no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court." *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (opinion of Stevens, J.). Because it had since become settled that "death *is* a different kind of punishment," this Court held that the government must now satisfy a heightened standard of "reliability." *Id.* at 357-59 (emphasis added).

This need for heightened reliability is now a cornerstone of this Court's death penalty jurisprudence: "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (internal quotations omitted); *see also, e.g., Mills v. Maryland*, 486 U.S. 367, 383 (1988) (discussing the "high requirement of reliability on the determination that death is the appropriate penalty"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (same); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (same).

At the same time that this Court has called for heightened reliability, it has also upheld and expanded on the first *Williams* holding by declaring that all relevant evidence, including evidence unfavorable to the accused, is generally admissible in a capital sentencing hearing. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 820-21 (1991); *Barefoot v. Estelle*, 463 U.S. 880, 897

(1983); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion).

Those courts that have rejected constitutional challenges to the admission of unadjudicated-crimes evidence have focused on the second of these two lines of authority while distinguishing the first. The Tenth Circuit, for example, acknowledged that "[t]he Court has since discredited some of the logic that undergirded its decision in *Williams*," but nonetheless chose to "follow *Williams*" based on this Court's "all relevant evidence" caselaw. *See Hatch*, 58 F.3d at 1465 (citing *Barefoot*). The Supreme Court of Virginia similarly relied on this Court's precedent for the proposition that "all possible relevant information," including unadjudicated criminal conduct, should be admitted. *See Watkins*, 331 S.E.2d at 436 (citing *Jurek*). Based on this analysis, it has repeatedly rejected arguments based on this Court's "reliability" cases. *See, e.g., Ramdass*, 437 S.E.2d at 569; *Beaver v. Commonwealth*, 352 S.E.2d 342, 346-47 (Va. 1987).

In contrast, state supreme courts that have reached contrary conclusions have stressed the need for heightened reliability in imposing a sentence of death. The Washington Supreme Court, for example, relied on this Court's *Gardner* decision for the proposition that there is an especially acute "need for accurate and reliable information at the sentencing phase of capital cases." *Bartholemew II*, 683 P.2d at 1084. The Supreme Court of Indiana likewise held that under *Gardner*, "due process considerations play an important role in the sentencing aspect of a criminal trial." *McCormick*, 397 N.E.2d at 280.

C. The Supreme Court of Virginia Erred.

By relying on the "all relevant evidence" rule, the Supreme Court of Virginia is misconstruing this Court's precedents to immunize the admission of improper evidence precisely where it is most harmful – at a capital sentencing hearing. As the Supreme Court of Utah explained in *Lafferty*, the law has a "longstanding hostility to evidence of other crimes because of

its potential for unfair prejudice." 749 P.2d at 1260 (citing cases). Such evidence is so prejudicial that it tends "to produce the impression that the [defendants] [a]re wretches whose lives [a]re of no value to the community, and who [a]re not entitled to the full benefit of the rules prescribed by law for the trial of human beings." *Boyd v. United States*, 142 U.S. 450, 458 (1892). Exclusion of such evidence "tends to prevent confusion of the issues, unfair surprise and undue prejudice." *Michelson v. United States*, 335 U.S. 469, 476 (1948).

Admission of *unproven* crimes is wholly unfair because a defendant must suddenly defend himself against numerous different charges, such that a sentencing hearing degenerates into a series of confusing mini-trials. Precisely because of the unfair prejudice and confusion that results from evidence of unadjudicated crimes, Virginia itself holds that such evidence is generally inadmissible:

> It is well settled in Virginia that a litigant's right to impeach the credibility of adverse witnesses by showing their participation in criminal conduct has been confined to questions about a *conviction* for a felony, perjury, and a misdemeanor involving moral turpitude. *This limitation upon a defendant's impeachment rights is a reasonably necessary measure to restrict the scope of a criminal trial. . . . [A]dmission of unadjudicated crimes for purposes of general impeachment of a witness would lead to confusion in directing the jury's attention to collateral matters and away from the issues of the case.*

Ramdass, 437 S.E.2d at 572 (emphasis added; internal quotation omitted). Exactly right. But Virginia departs from these well-settled principles when it comes to admitting evidence *unfavorable* to the accused in a *death* case – exactly where such evidence is most harmful.

This perverse practice finds no support in this Court's precedents. Simply put, the "all relevant evidence" rule does not shield the admission of unreliable or unfairly prejudicial

evidence. Instead, that rule provides that character evidence is *generally* admissible in capital sentencing hearings. But as this Court has repeatedly stated, otherwise admissible evidence must still be excluded if it is so unreliable or prejudicial as to render the proceedings unfair. *See, e.g., Payne v. Tennessee*, 501 U.S. 808, 825 (1991) ("In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."); *id.* at 831 (O'Connor, J., concurring) (emphasizing this point); *Gregg v. Georgia*, 428 U.S. 153, 203-04 (1976) (plurality opinion) (holding that the jury "should have as much information before it as possible" "*[s]o long as the evidence introduced and the arguments made at the presentence hearing do not prejudice the defendant*") (emphasis added); *Romano v. Oklahoma*, 512 U.S. 1, 14-15 (1994) (O'Connor, J., concurring) (stressing that relevant evidence was admissible because it "was *accurate* at the time it was admitted") (emphasis in original).

In addition to emphasizing the importance of promoting reliability while avoiding unfair prejudice, this Court has also applied a sliding-scale analysis in determining what death penalty procedures are required. *See Turner v. Murray*, 476 U.S. 28, 36 (1986) ("[W]e find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized."); *cf. Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) ("identification of the specific dictates of due process" entails balancing inquiry). Here, the interests to be protected, the presumption of innocence and the avoidance of prejudice, are overwhelming. In this country, a man is presumed innocent until proven guilty, beyond a reasonable doubt, in a court of law. Yet Virginia provides the accused with *none* of the constitutional safeguards that are designed to ensure reliability in criminal prosecutions before it permits a jury to consider unadjudicated criminal conduct in a proceeding focused entirely on whether *death* is an appropriate punishment. As the

Supreme Court of Alabama explained, this approach runs contrary to the fundamental presumption of innocence:

> [the defendant] may well be convicted at some future date of this robbery, but then again he may *not* be convicted for any number of reasons. Until the State proves him guilty of this charge in accordance with appropriate legal procedures [the defendant] is presumed innocent. *This fundamental tenet of our system of justice prohibits use against an individual of unproven charges in this life or death situation.*

Cook, 369 So.2d at 1257 (first emphasis in original; second emphasis added). Moreover, this evidence is not considered by a sentencing judge, as in *Williams*, or by an unbiased jury, as in proper criminal prosecutions. Instead, the jury that considers this highly inflammatory evidence of other crimes is a jury that has already found the defendant guilty of a capital offense – and whose view of the defendant, and the likelihood that the defendant committed the other crimes, is thus tainted. As the Supreme Court of Washington explained,

> [a] jury which has convicted defendant of a capital crime is unlikely fairly and impartially to weigh evidence of prior alleged offenses. In effect, to allow such evidence is to impose upon a defendant who stands in peril of his life the burden of defending, before the jury that has already convicted him, new charges of criminal activity. Information relating to defendant's criminal past should therefore be limited to his record of convictions.

Bartholemew I, 654 P.2d at 1184.

Given what is at stake, the need for "serious and calm reflection" on this "decision of such gravity and finality" far outweighs any *legitimate* governmental interest in exposing the jury to such highly prejudicial evidence. *Cf. Thompson v. Oklahoma*, 487 U.S. 815, 856 (1988) (O'Connor, J., concurring). That much is obvious from the fact that the great majority of states that impose the death penalty see no need to

impose a system as extreme as Virginia's. *See, e.g.*, Smith, *Unreliable and Prejudicial*, 93 Colum. L. Rev. at 1268 ("more than two-thirds of the states [to address this issue] have deemed unrestricted use of the evidence unacceptable"). As this Court has held, "[t]he State's interest in prevailing at trial – unlike that of a private litigant – is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985).

Moreover, even if such evidence is to be admitted (and it should not be), no reasonable balancing could sanction Virginia's refusal to require that allegations of unadjudicated criminal conduct at least be proven beyond *some* standard of proof, be it beyond a reasonable doubt, by clear and convincing evidence, or even some lesser standard of proof. Such a requirement would hardly be a serious imposition on the state's judicial system, and would improve the jury's decisionmaking process. If the trial judge were required to make the initial determination, as in Louisiana, *see supra* page 13, the jury would never be exposed to unreliable allegations – and would thus render a more reliable decision. If, on the other hand, the jury were required to make this determination, as in California and Utah, *see supra* page 12, the standard of proof would focus the jury's attention on the presumption of innocence and the importance of treating unproven allegations with skepticism. As this Court has explained, standards of proof "indicate the relative importance attached to the ultimate decision" by "instruct[ing] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Addington v. Texas*, 441 U.S. 418, 423 (1979) (internal quotation omitted).

The use of some standard of proof regarding unadjudicated criminal conduct would thereby safeguard the constitutional rights of individuals whose lives would otherwise depend on jurors' ability to balance mitigating evidence with wildly prejudicial evidence of past wrongs that, no matter how unreliable, might persuade them to impose capital punishment. Here as in *Turner*, "the ease with which that risk could have been minimized" confirms that Virginia's system violates due process. 476 U.S. at 36.

D. This Is a Question of Exceptional Importance.

The importance of this issue, both to the administration of justice and to Mr. Lovitt's survival, makes it especially important that this Court grant *certiorari* to consider the question now. As shown by the number of court opinions and law review articles on point, prosecutors routinely use evidence of unadjudicated crimes at capital sentencings. Just since 1985, the Supreme Court of Virginia alone has affirmed more than *25* death sentences based on its rule of *per se* admissibility. *See* App. 14a; *Lenz v. Commonwealth*, 544 S.E.2d 299, 303 (Va. 2001); *Johnson v. Commonwealth*, 529 S.E.2d at 776; *Vinson v. Commonwealth*, 522 S.E.2d 170, 178 (Va. 1999); *Orbe v. Commonwealth*, 519 S.E.2d 808, 814 (Va. 1999); *Walker*, 515 S.E.2d at 571; *Cherrix v. Commonwealth*, 513 S.E.2d 642, 647 (Va. 1999); *Goins v. Commonwealth*, 470 S.E.2d 114, 122 (Va. 1996); *Roach v. Commonwealth*, 468 S.E.2d 98, 105 (Va. 1996); *Cardwell v. Commonwealth*, 450 S.E.2d 146, 155 (Va. 1994); *Williams v. Commonwealth*, 450 S.E.2d 365, 371 (1994); *Breard v. Commonwealth*, 445 S.E.2d 670, 675 (Va. 1994); *Swann v. Commonwealth*, 441 S.E.2d 195, 200 (Va. 1994); *Ramdass*, 437 S.E.2d at 569; *Stewart v. Commonwealth*, 427 S.E.2d 394, 400 (Va. 1993); *Yeats v. Commonwealth*, 410 S.E.2d 254, 267 (Va. 1991); *Stockton*, 402 S.E.2d at 206; *Watkins v. Commonwealth*, 385 S.E.2d 50, 56 (Va. 1989); *Spencer v. Commonwealth*, 384 S.E.2d 785, 798-99 (Va. 1989); *O'Dell v. Commonwealth*, 364 S.E.2d 491, 506-07 (Va. 1988); *Pope v. Commonwealth*, 360 S.E.2d 352, 360 (Va. 1987); *Gray*

v. Commonwealth, 356 S.E.2d 157, 175-76 (Va. 1987); *Beaver*, 352 S.E.2d at 346-47; *Pruett v. Commonwealth*, 351 S.E.2d 1, 11-12 (Va. 1986); *Watkins*, 331 S.E.2d at 436; *Poyner v. Commonwealth*, 329 S.E.2d 815, 827-28 (Va. 1985).

Since the 1949 *Williams* decision, this Court has never addressed this issue. In 1996, however, this Court granted *certiorari* on the "limited" question whether a petitioner had preserved his claim that the government's failure to provide advance notice of unadjudicated-crimes evidence admitted at trial violated his constitutional rights. *Gray v. Netherland*, 518 U.S. 152, 161 (1996).[4] If that procedural question warrants *certiorari*, surely the state supreme courts' conflict on this more fundamental issue is worthy of this Court's attention. Since further delay in resolving this important question would serve only to render countless additional death sentences constitutionally suspect, this Court should grant *certiorari* now.

The other reason this Court should grant *certiorari* now is that this question is squarely presented on the record in this case, on which Robin Lovitt's life depends. The Commonwealth introduced extensive evidence of alleged unadjudicated crimes at Mr. Lovitt's trial, and relied heavily on such evidence in closing argument. The jury heard testimony, for example, that Mr. Lovitt was repeatedly found in possession of dangerous weapons, and thus had a dangerous "propensity to self-arm." Va. J.A. 1797, 1799; *see also supra* pages 6-7. The jurors were also inundated by records stating that Mr. Lovitt had committed numerous violent criminal acts, including

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[4] The only Justice to address the broader admissibility question determined that "[w]hatever limits due process places upon the introduction of evidence of unadjudicated conduct in capital cases, they surely were exceeded here. Given the vital importance that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion, the sentencing proceeding would have been fundamentally unfair even if the prosecutors had given defense counsel fair notice of their intent to offer this evidence." *Gray*, 518 U.S. at 171 (Stevens, J., dissenting) (internal quotations omitted).

battery and the manufacture of dangerous weapons. *See supra* page 6. The introduction of these records was especially unfair because many of them referred to incidents that occurred many years earlier when Mr. Lovitt was a juvenile. During closing argument, the Commonwealth repeatedly referred to this evidence, and specifically requested the jury to "look at the paperwork, because in fact there are more than one acts of violence listed in there." Va. J.A. 1719. Because the jury's sentence "might well have been influenced" by this extensive evidence of unadjudicated crimes, Robin Lovitt deserves another chance at life. *See Arizona v. Fulminante*, 499 U.S. 279, 302 (1991); *see also Johnson*, 486 U.S. at 586 (reversing because of the "*possibility* that the jury's belief that petitioner had been convicted of a prior felony would be decisive in the choice between a life sentence and a death sentence") (emphasis added; internal quotations omitted).

II. THE SUPREME COURT OF VIRGINIA COMMITTED NUMEROUS ADDITIONAL ERRORS IN AFFIRMING ROBIN LOVITT'S CONVICTION AND SENTENCE OF DEATH.

In addition to permitting Mr. Lovitt to be sentenced to death based on evidence of unadjudicated criminal conduct, the Supreme Court of Virginia made a number of additional errors. First, the court failed to recognize that death is a disproportionate sentence in this case. Section 17.1-313(C)(2) of the Virginia Code requires the Supreme Court of Virginia to ensure that Mr. Lovitt's sentence of death is not excessive or disproportionate to the penalty imposed by the Commonwealth in similar cases. The Supreme Court of Virginia nonetheless failed to compare the underlying facts and circumstances of this case with the facts and circumstances of other *comparable* cases. *See* App. 26a-19a.

Instead, the Virginia court relied on cases that are plainly inapposite. In this case, unlike in the cases on which the court relied, there is no evidence that the assailant intended to confront a victim, armed himself with a deadly weapon in

preparation for such a confrontation, or ever planned to use any weapon while stealing the cash register box. Instead, the evidence showed that the perpetrator was surprised during the theft and reacted by using an object laying nearby to commit the crime. As far as counsel can discern, Virginia has *never* imposed the extreme penalty of death in such a circumstance.

Nonetheless, the Supreme Court of Virginia failed to honor Mr. Lovitt's right to a meaningful proportionality review, and instead undertook a standardless, *ad hoc* review that turned a blind eye to the fact that Mr. Lovitt's sentence of death marks a dramatic expansion of death penalty. The court therefore violated Mr. Lovitt's right, under the Eighth and Fourteenth Amendments, to have this state-mandated procedure applied in a non-arbitrary manner. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 401 (1985).

Second, the Supreme Court of Virginia erred by holding that the trial court acted within its discretion by: (1) permitting testimony that Mr. Lovitt failed to appear for an appointment with his probation officer; and (2) permitting the introduction of a record showing that Mr. Lovitt missed a required appearance in Juvenile and Domestic Relations Court. *See* App. 19a-20a. Any marginal relevance of these missed appointments was far outweighed by the prejudice caused by unnecessarily exposing Mr. Lovitt's past contacts with the criminal justice system to the jury. *See Lewis v. Commonwealth*, 303 S.E.2d 890, 893 (Va. 1983) (legitimate probative value of evidence must exceed incidental prejudice to defendant).

Third, the Supreme Court of Virginia erred by upholding the trial court's refusal to strike an emotional juror for cause. *See* App. 16a-17a. If there is a reasonable doubt that a juror can render a fair and unbiased verdict, the juror should be excluded. *See Breeden v. Commonwealth*, 227 S.E.2d 734, 735 (Va. 1976); *Gosling v. Commonwealth*, 376 S.E.2d 541, 544 (Va. Ct. App. 1989) ("Any reasonable doubt regarding the prospective juror's ability to give the accused a fair and

impartial trial must be resolved in favor of the accused."). In this case, the juror actually shed tears in the courtroom when she was questioned on whether the fact that five of her fellow students and neighbors had been murdered would impair her ability to be an impartial juror. *See* App. 16a. Refusal to strike such an obviously unqualified juror violated Mr. Lovitt's right to a fair trial under the federal and state constitutions. *See* U.S. CONST. amend. V, VI, VIII, XIV; VA CONST. art. I, §§ 1, 8, 9, 11.

Fourth, the Supreme Court of Virginia erred by refusing to consider whether the trial court committed reversible error by permitting a police detective to testify regarding a prison informant's reputation for truth and veracity over Mr. Lovitt's objection. *See* Va. J.A. 1319. During his appeal to the Supreme Court of Virginia, Mr. Lovitt argued that this testimony should have been struck for a number of reasons. *See* Opening Brief of Appellant at 13. Even though Mr. Lovitt preserved this objection during trial, *see* Va. J.A. 1319, and on appeal, *see* Opening Brief of Appellant at 14-15; Reply Brief of Appellant at 7, the Supreme Court of Virginia refused to consider this important issue on the untenable ground that Mr. Lovitt waived it. *See* App. 18a-19a. Even if Mr. Lovitt had not objected at trial (and he did), the Supreme Court of Virginia still should have considered this issue "for good cause shown" and "to attain the ends of justice." *Woodson v. Commonwealth*, 176 S.E.2d 818, 820 (Va. 1970); *Cooper v. Commonwealth*, 140 S.E.2d 668, 693-94 (Va. 1965).

Fifth, the Supreme Court of Virginia erred by affirming the trail court's refusal to permit Mr. Lovitt's counsel to argue to the jury during sentencing that Mr. Lovitt would die in prison. On a conviction for capital murder, the only alternative to a sentence of death is a sentence of life without possibility of parole. *See* Va. Code §§ 19.2-264.4.A, 53.1-165.1, and 53.1-40.01. Since the natural course of a life sentence without parole is for the prisoner to die in prison, Mr. Lovitt had a constitutional right to argue this fact to the jury. *See* U.S.

CONST. amend. V, VIII, XIV; *see also Simmons v. South Carolina*, 512 U.S. 154, 161 (1994) ("The Due Process Clause does not allow the execution of a person 'on the basis of information which he had no opportunity to deny or explain.'").

Sixth, the Supreme Court of Virginia erred by sustaining the trial court's denial of Mr. Lovitt's motion to strike the capital offense based upon insufficiency of the evidence. *See* App. 20a-22a. The record fails to demonstrate evidence by which a rational trier of fact could find proof of guilt beyond a reasonable doubt. In the alternative, even if sufficient evidence existed to sustain Mr. Lovitt's conviction for a capital offense, there would still not be sufficient record evidence to sustain the jury's finding of "future dangerousness." *See* App. 23a-25a.

Seventh, the Supreme Court of Virginia erred by refusing even to consider the propriety of the trial court's refusal to permit Mr. Lovitt's counsel to testify that the Commonwealth's forensic witness had made statements inconsistent with her testimony at trial. *See* App. 22a. By denying Mr. Lovitt the opportunity to introduce evidence which would impeach an important government witness, the court abused its discretion and violated Mr. Lovitt's right to due process as guaranteed by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Eighth, the Virginia death penalty statute, Virginia Code Sections 19.2-264.2 through 19.2-264.5, 17.1-313(C)(2), and 17.1-313(E), are, upon their face and as applied, in violation of the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, Sections 8, 9, and 11 of the Virginia Constitution. Specifically, the statutes are unconstitutional because (1) the "future dangerousness" aggravator is unconstitutionally vague on its face; (2) the "future dangerousness" aggravator is unconstitutionally vague as applied; and (3) the unadorned statutory terms are unconstitutionally vague. Thus, Mr. Lovitt's sentence for capital murder should be overturned or, in the alternative, his

sentence of death should be commuted to life imprisonment without possibility of parole.

Ninth, the Supreme Court of Virginia erred by failing to reverse the trial court's ruling, under Virginia Code Section 17.1-313(C), that the presence of the victim's family members less than 15 inches from the juror's box did not result in a sentence of death imposed under the influence of passion, prejudice, or any other arbitrary factor. *See* App. 25a.

Tenth, the Supreme Court of Virginia erred by holding that the trial court's refusal to permit the defendant to question prospective jurors individually did not violate Mr. Lovitt's right to an impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *See* App. 15a. Preventing Mr. Lovitt's counsel from individually questioning jurors to ensure their suitability for a death penalty case was inconsistent with the constitutional requirement that additional procedural safeguards be followed in capital cases. *See, e.g.*, *Murray v. Giarratano*, 492 U.S. 1, 8 (1989).

Finally, the Supreme Court of Virginia erred by sustaining the trial court's refusal to grant Mr. Lovitt additional peremptory challenges. *See* App. 15a. Granting additional peremptory challenges in a capital case is consistent with this Court's holding that the qualitative difference between death and other punishments requires heightened reliability in the determination that death is the appropriate punishment in a particular case. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The trial court's refusal to grant additional challenges to Mr. Lovitt was contrary to his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX A

SENTENCING ORDER

VIRGINIA: IN THE CIRCUIT COURT OF ARLINGTON COUNTY, VIRGINIA

FEDERAL INFORMATION PROCESSING STANDARDS CODE: 013

Hearing Date: March 1, 2000

Clerk: CK

Judge: Benjamin Kendrick

COMMONWEALTH OF VIRGINIA

vs **CR99-56**

ROBIN LOVITT

The 1st day of March, 2000 came the Commonwealth of Virginia by its Attorneys, Margaret Eastman and Barbara Walker, the Probation Officer for the Circuit Court of Arlington County, Virginia, the Defendant in the custody of the Sheriff and his Court Appointed Attorneys, Denman Rucker and Janell Wolfe.

WHEREUPON this case came before the Court on the Defendant's **motion to set aside the guilty verdict of capital murder**, and argument of counsel was heard on same.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the Defendant's motion be and it hereby is **denied**.

WHEREUPON this case came before the Court on the Defendant's motion to **set aside the guilty verdict of death**, and argument of counsel was heard on same.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the Defendant's motion be and it hereby is **denied**.

CASE NO.	OFFENSE (FM)	OFFENSE DATE
CR99-56	**Capital Murder (F)**	**11/18/98**

VA CODE SEC
18.2-32

WHEREUPON this case came before the Court on the Defendant's **motion to set aside the death penalty verdict based upon proportionality**, and argument of counsel was heard on same.

UPON CONSIDERATION WHEREOF it is the opinion of the Court that the Defendant's motion be and it hereby is **denied**.

This case came before the Court for sentencing of the Defendant, the Court having previously found the Defendant guilty pursuant to the verdict of the jury, which the Court determined to be right and proper, of the following offense:

WHEREUPON the Defendant was asked if he had read and understood the report, and if he had discussed the report with his counsel, to all of which the Defendant replied in the affirmative.

THEREUPON the Court ordered that the report of the Probation Officer be filed as a part of the record in this case, after certain discrepancies were noted therein, as are more specifically set forth in the stenographic record of this case.

WHEREUPON the Defendant, his Attorney, and the Attorney for the Commonwealth were asked if they desired to have the Probation Officer or any other witness sworn to testify regarding the matter before the Court, to which the Defendant answered in the affirmative.

THEREUPON the Defendant called witnesses to testify in the matter, who were duly sworn as the law directs.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant

desired to advance any reason why judgment should not be pronounced.

Having taking into consideration all of the evidence in this case, the report of the Probation Officer, argument of counsel, and any statements made;

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: **DEATH**.

IT IS FURTHER ORDERED that the execution date be set for June 1, 2000

IT IS FURTHER ORDERED by the Court that the aforesaid execution be stayed pending appeal.

This sentence shall run **consecutively** with all other sentences.

The defendant shall pay costs of **$4,612.00**.

The Defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code Section 53.1-187.

IT IS FURTHER ORDERED by the Court that as soon as possible after the entry of this order, the Defendant be removed and safely conveyed according to law from the Jail of this Court to the Penitentiary of this Commonwealth therein to be kept, confined and treated in the manner provided by law.

IT IS FURTHER ORDERED by the Court that Denman Rucker, Esquire, and Janell Wolfe, Esquire, who were heretofore appointed as counsels for the Defendant be paid a fee of $882.00 **each** for their services in this case, same to be paid by the Commonwealth of Virginia as provided in Title 19.2-163 of the 1950 Code of Virginia, as amended.

AND the Defendant is hereby **remanded** to jail.

DEFENDANT IDENTIFICATION:

Alias:

SSN: 224-11-4524 DOB: 11/6/63 SEX: Male

SENTENCING SUMMARY

TOTAL SENTENCE IMPOSED: Death

TOTAL SENTENCE SUSPENDED: Not

ENTERED this 20th day of March, 2000

/s/ Benjamin Kendrick
Judge

APPENDIX B

Supreme Court of Virginia.

Robin **LOVITT**

v.

COMMONWEALTH of Virginia.

Record Nos. 001015, 001420.

Nov. 3, 2000.

In these appeals, we review the capital murder conviction and death sentence imposed on Robin Lovitt, along with his conviction for robbery.

I. PROCEEDINGS

Lovitt was indicted for capital murder based on the willful, deliberate, and premeditated killing of Clayton Dicks during the commission of a robbery, in violation of Code § 18.2-31(4). Lovitt also was indicted for the robbery of Dicks, in violation of Code § 18.2-58.

In the first stage of a bifurcated trial conducted under Code § 19.2-264.3, a jury convicted Lovitt of the offenses charged. In the penalty phase of the trial, the jury fixed his punishment for capital murder at death based on a finding of "future dangerousness," and for robbery at life imprisonment. The trial court sentenced Lovitt in accordance with the jury verdict.

We consolidated the automatic review of Lovitt's death sentence with his appeal of the capital murder conviction. Code § 17.1-313(F). We also certified Lovitt's appeal of his robbery conviction from the Court of Appeals and consolidated that appeal with his capital murder appeal. Code § 17.1- 409.

II. GUILT PHASE EVIDENCE

We will state the evidence presented at trial in the light most favorable to the Commonwealth, the prevailing party in the trial court. *Walker v. Commonwealth*, 258 Va. 54, 60, 515 S.E.2d

565, 568 (1999), *cert. denied,* 528 U.S. 1125, 120 S.Ct. 955, 145 L.Ed.2d 829 (2000); *Roach v. Commonwealth*, 251 Va. 324, 329, 468 S.E.2d 98, 101, *cert. denied,* 519 U.S. 951, 117 S.Ct. 365, 136 L.Ed.2d 256 (1996). The evidence showed that in the early morning hours of November 18, 1998, Clayton Dicks was stabbed six times in the chest and back while working during the overnight shift at Champion Billiards Hall (the pool hall) in Arlington County.

A few months before the killing, Lovitt worked as a cook at the pool hall on an evening shift that ended when Dicks arrived to begin the overnight shift. Amy Hudon, the manager at the pool hall, testified that about two months before Dicks was killed, she had trouble opening a cash register drawer near a pool table and asked Lovitt to help her open the drawer. Lovitt opened it by "wedging" a pair of scissors into the drawer's latch. About two months before the killing, Lovitt quit working at the pool hall.

On November 17, 1998, the day before the killing, Lovitt went to the Arlington home of his cousin and tried to sell him a television set. The same day, Lovitt spoke to an acquaintance in a failed attempt to find a job.

Later that night, Lovitt went to the pool hall between 8:00 and 10:00 p.m. and spoke with people he knew. When Lovitt asked some of them for money, each refused his request. Two of these people recalled that Lovitt wore a flannel shirt that night. The bartender that night, Thomas Schweiker, did not know Lovitt but remembered giving matches to a man leaning over the bar. Later, Schweiker noticed that a pitcher containing cash from cigarette sales was missing from beneath the bar where the man had been leaning. Schweiker testified that the man, an African-American in his middle or late twenties, had a stocky build and facial hair, and was wearing a plaid flannel shirt.

Dicks arrived at the pool hall between 1:30 and 2:00 a.m. The other employees present when Dicks arrived had left the

pool hall by 3:00 a.m., leaving Dicks as the sole employee on the premises. The last four patrons in the pool hall that morning left between 2:45 and 3:00 a.m. One of these patrons was Officer Dennis A. Holland of the United States Capitol Police, who was a long-time patron at the pool hall. Holland testified that he saw a man who looked "familiar" enter the pool hall as he and his friends were leaving. Holland described the man as being black, about five feet, ten or eleven inches tall, weighing between 185 and 190 pounds, and wearing a flannel shirt.

About 3:25 a.m., Jose N. Alvarado and Carlos Clavell entered the pool hall and saw two men arguing behind the bar. Alvarado testified that one man was shorter than the other, and that the shorter man repeatedly shoved the taller man, who was wearing an apron. Alvarado stated that he and Clavell watched as the shorter man stabbed the taller man six or seven times with a silver-colored weapon. Alvarado saw blood on the taller man's apron and watched as the taller man fell to the floor behind the bar. Clavell testified that he heard the taller man begging the shorter man to stop attacking him. Both Alvarado and Clavell saw the assailant repeatedly kick the man who had fallen to the floor.

Alvarado and Clavell immediately ran from the pool hall to a service station, where Alvarado telephoned the "911" emergency response number and reported what they had seen. Although Alvarado could not identify Lovitt as Dicks's assailant at the preliminary hearing held in this case, Alvarado testified at trial that he was about "80% certain" that Lovitt was the assailant.

When police and emergency medical personnel arrived at the pool hall in response to Alvarado's telephone call, they found Dicks lying on the floor behind the bar in a pool of blood. Dicks was alive but was unable to speak and was taken by helicopter to a nearby hospital. The multiple stab wounds prevented his heart from functioning, and he died while awaiting surgery.

Dicks had been stabbed six times, five times in the chest and once in the back. Four of these wounds were lethal. Dicks also suffered two areas of internal hemorrhage on both sides of his head, as well as external abrasions on both shoulders and on his left knee.

The police recovered from the pool hall a cash register that was lying on the floor near where Dicks was found. The register was broken into pieces, the cash drawer had been removed from the register and was missing, and a torn piece of a ten-dollar bill was found nearby. A pair of scissors with orange handles that was usually kept in a container on the bar was missing. A police canine unit found an orange-handled pair of scissors bearing blood lying open in the woods about 15 yards behind the pool hall.

Warren A. Grant, Lovitt's cousin, testified that Lovitt arrived at Grant's home in the early morning hours of November 18, 1998. Grant lived about a quarter of a mile from the pool hall in a residential area located on the "other side" of the woods. Grant stated that Lovitt knocked on his door sometime between 1:30 and 3:00 a.m. Lovitt was wearing a plaid shirt and entered the house carrying what looked like a large, square, gray metal box. After Lovitt unsuccessfully tried to open the locked box, Grant eventually opened it by using a screwdriver to "pop" some of the screws securing the box. Lovitt removed money from the opened cash register drawer and divided the cash between himself and Grant. Lovitt left the cash register drawer with Grant and instructed him to "[g]et rid of [it]." A few days later, Grant began cutting the cash drawer into pieces with tin snips and put them in a bag.

Grant's girlfriend, Delores L. Harris, testified that she was in Grant's house that morning and watched Grant and Lovitt open the cash register drawer. She noticed that Lovitt looked "sweaty" and gave him a towel.

On November 20, 1998, Arlington Detective Noel E. Hanrahan obtained pieces of the cash register drawer from

Grant. Four days later, Lovitt was arrested and charged with the present offenses. At that time, he was wearing a plaid shirt and a dark jacket, and he told the police that he had been wearing the same clothes for the past few days. When Officer Stephen Ferrone collected Lovitt's clothing at the jail, Ferrone asked a detective whether he needed to seize Lovitt's jacket. Ferrone testified that, upon hearing this question, Lovitt stated, "I wasn't wearing it when it happened."

Julian J. Mason, Jr., a forensic scientist employed by the Virginia Division of Forensic Science, qualified as an expert witness on the subject of tool mark identification. He testified that the cash register drawer Grant surrendered to the police had been removed from the broken cash register found on the floor of the pool hall. Mason also stated that the pry marks on the cash register drawer were made by the scissors that were found in the woods behind the pool hall.

Lawrence Abrams, an identification technician for the Arlington County Police Department, testified that he was not able to obtain fingerprints from the handle of the scissors due to its irregularly-shaped surface. The only identifiable fingerprints obtained in relation to the present crimes were Grant's fingerprints that were obtained from the cash register drawer.

Carol Palmer, a forensic scientist employed by the Virginia Department of Forensic Science, qualified as an expert witness on DNA testing. Palmer extracted human DNA from two places on the scissors, on a blade near the tip and on a blade near the finger loops. She also extracted blood from three small circular areas on the left front side of Lovitt's jacket, but the DNA tests were inconclusive and Palmer was unable to determine whether the blood on the jacket was human. Palmer found no blood on the flannel shirt, black jeans, or shoes that Lovitt was wearing when he was arrested.

Palmer testified that she performed DNA testing using the "polymerase chain reaction," or PCR, technique on the DNA

extracted from the scissors. The DNA extracted from the tip of the scissors displayed a DNA profile that matched the DNA profile of Dicks. The profile derived from this sample did not match the DNA profiles of either Lovitt or Grant, thus eliminating both as contributors of this DNA. Palmer stated that the chance of someone other than Dicks contributing the DNA sample on the tip of the scissors was 1 in more than 5.5billion.

The DNA extracted from the mid-section of the scissors also matched the DNA profile of Dicks. However, Palmer stated that this DNA evidence, unlike the DNA evidence from the tip of the scissors, did not exclude either Lovitt or Grant and, thus, was inconclusive as to them.

After Lovitt's arrest, he was incarcerated in the Arlington County Jail in the same unit as Casel Lucas. Lovitt and Lucas developed a friendship during the two months that they lived together in this unit. Lovitt first told Lucas that after leaving the bathroom at the pool hall on the night of the murder, Lovitt saw a Hispanic man stabbing Dicks. Lovitt told Lucas that, at that time, Lovitt saw the cash register drawer, grabbed it, and ran from the pool hall.

According to Lucas, Lovitt later stated that he knew Dicks and was aware that no one else would be in the pool hall late at night. Lovitt further related that he waited in the bathroom until everyone left the pool hall before coming out of the bathroom to attempt to open the cash register drawer. Dicks confronted Lovitt as he unsuccessfully attempted to open the cash drawer. Lovitt told Lucas that he had to kill Dicks because Dicks had recognized him. According to Lovitt, Dicks asked him, "[W]hy [are] you doing this?" Lovitt admitted to Lucas that he stabbed Dicks several times and took the cash register drawer to his cousin's house where he and his cousin split the money before leaving to buy some drugs. Lovitt told Lucas that he discarded the murder weapon while en route to or from Grant's house, and that he changed his clothes at Grant's house because he had blood on his shirt and pants.

Detective Irv Ellman testified that he has been employed by the City of Alexandria Police Department for about 15 years. He stated that he has known Lucas since 1994, that he knows other people in the law enforcement community who know Lucas, and that Lucas has a reputation among the law enforcement community for being truthful.

On cross-examination, Ellman testified that he was aware of Lucas's felony convictions. When asked if he knew how many convictions Lucas had, Ellman stated, "Myself, I'm responsible for probably 14 counts, some burglaries and a recent armed burglary. That is how I know that he is truthful." When asked whether Lucas had testified on a previous occasion in an unrelated case in order "to cut a deal against someone else," Ellman replied that he knew Lucas had testified in an earlier case, but did not know if he had made a "deal" with the prosecutor. When asked whether he believed that Lucas would lie to help or save himself, Ellman replied, "No."

Detective Stuart Chase of the Arlington County Police Department testified that Carlos Clavell, one of the two witnesses to the killing, told Chase that he saw "a light-colored vehicle, probably a Cadillac" parked in the pool hall parking lot when he and Alvarado arrived at the pool hall that night. Clavell told Chase that he saw the Cadillac again when he and Alvarado ran to telephone the police, but that the car was gone when they returned to the pool hall with the police.

Andre M. Boyd and Tashia A. Davis testified that they were at the pool hall on the night of the killing, and that Lovitt asked each of them for money. Boyd and Davis left the pool hall together between 2:45 and 3:00 a.m. on November 18, 1998. According to Boyd, he and Davis walked to Boyd's mother's house about seven blocks away. However, Davis testified that she and Boyd left the pool hall parking lot in a 1987 gray Cadillac and drove to Boyd's mother's house on Oxford Street.

State Trooper T.L. Robinson testified that on November 18, 1998, between 3:00 and 4:00 a.m., he was notified by a police

dispatcher to "be on the lookout" for an older white Cadillac. Robinson reported to the dispatcher that 10 to 15 minutes earlier, he had seen a white, 1973 Cadillac Eldorado pass below a highway ramp on which he was parked.

III. PENALTY PHASE EVIDENCE

During the penalty phase of the trial, the Commonwealth presented evidence of Lovitt's criminal record. In October 1975, when Lovitt was 11 years old, he was charged with assault and placed in protective supervision. Also as a juvenile, in August 1979, Lovitt was committed to the Beaumont Learning Center of the State Department of Corrections (Beaumont) based on adjudication of charges of breaking and entering and larceny. While at Beaumont, Lovitt was disciplined for fighting, assault, and possessing contraband items. After his release from Beaumont in 1980, Lovitt was convicted of grand larceny in 1981 and was sentenced to 12 months in jail.

Between 1983 and 1985, Lovitt was convicted of petit larceny, grand larceny, breaking and entering, and distribution of marijuana. In 1986, Lovitt was convicted of attempted robbery and was sentenced to a term of imprisonment of from one to three years. After being released on parole in August 1987, Lovitt's parole was revoked in August 1988 based, in part, on additional arrests and his failure to pass certain drug tests. Lovitt later was convicted of statutory burglary and grand larceny. While incarcerated on these convictions and the parole violation, Lovitt was disciplined for damaging property and for fighting.

In September 1990, Lovitt again was released on parole. In early 1991, Lovitt was convicted of possession of cocaine, grand larceny, and burglary. While incarcerated on these charges, Lovitt was the subject of ten disciplinary actions for offenses including possession of contraband, disobeying direct orders, assault, possession of intoxicants, and manufacturing "shank handles." After being released on parole in October

1996, Lovitt was convicted in 1997 of possession of marijuana, petit larceny, unlawful entry, assault and battery, and destruction of property. Lovitt was on parole at the time of the present offenses.

In October 1998, Arlington County Police Officer Jerome A. Lee detained Lovitt in an apartment parking lot in Arlington. Lovitt had parked his car behind the apartments, appeared to be very nervous, and consented to a search of his vehicle. Lee found a long kitchen knife on the floor of the passenger area and a soda can used to smoke crack cocaine in the rear floor area of the vehicle.

Lovitt presented testimony from his sister, Amanda Jones, who testified that Lovitt was the oldest of 12 children and that he helped take care of his younger siblings, although not "gladly." Lovitt also presented testimony from four deputies employed by the Arlington County Sheriff's Office, who stated that Lovitt had not presented any disciplinary problems while being held in jail on the present charges.

IV. ISSUES PREVIOUSLY DECIDED

On appeal, Lovitt raises certain arguments that we have resolved in previous decisions. Since we find no reason to modify our previously expressed views, we reaffirm our earlier holdings and reject the following arguments:

A. Imposition of the death penalty constitutes cruel and unusual punishment in violation of the United States Constitution and the Constitution of Virginia. Rejected in *Johnson v. Commonwealth*, 259 Va. 654, 667, 529 S.E.2d 769, 776 (2000); *Yarbrough v. Commonwealth*, 258 Va. 347, 360 n. 2, 519 S.E.2d 602, 607 n. 2 (1999); *Goins v. Commonwealth*, 251 Va. 442, 453, 470 S.E.2d 114, 122, *cert. denied*, 519 U.S. 887, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996).

B. The "future dangerousness" aggravating factor is unconstitutionally vague because (1) it requires jurors to reach a finding based on the confusing standard of a "probability"

"beyond a reasonable doubt;" and (2) the failure to provide jury instructions regarding the meaning of the term "future dangerousness" violates the United States Constitution and the Constitution of Virginia. Rejected in *Johnson*, 259 Va. at 667, 529 S.E.2d at 776; *Walker*, 258 Va. at 61, 515 S.E.2d at 569; *Cherrix v. Commonwealth*, 257 Va. 292, 299, 513 S.E.2d 642, 647, *cert. denied*, 528 U.S. 873, 120 S.Ct. 177, 145 L.Ed.2d 149 (1999); *Williams v. Commonwealth*, 248 Va. 528, 536, 450 S.E.2d 365, 371 (1994), *cert. denied*, 515 U.S. 1161, 115 S.Ct. 2616, 132 L.Ed.2d 858 (1995); *Smith v. Commonwealth*, 219 Va. 455, 476-78, 248 S.E.2d 135, 148-49 (1978), *cert. denied*, 441 U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 (1979).

C. The "future dangerousness" aggravating factor unconstitutionally permits consideration of unadjudicated conduct. Rejected in *Johnson*, 259 Va. at 667, 529 S.E.2d at 776; *Cherrix*, 257 Va. at 299, 513 S.E.2d at 647; *Williams*, 248 Va. at 536, 450 S.E.2d at 371.

D. Virginia's penalty phase instructions do not adequately instruct the jury concerning mitigation. Rejected in *Buchanan v. Angelone*, 522 U.S. 269, 275-76, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998); *Yarbrough*, 258 Va. at 360 n. 2, 519 S.E.2d at 607 n. 2; *Cherrix*, 257 Va. at 299, 513 S.E.2d at 647; *Swann v. Commonwealth*, 247 Va. 222, 228, 441 S.E.2d 195, 200, *cert. denied*, 513 U.S. 889, 115 S.Ct. 234, 130 L.Ed.2d 158 (1994).

E. The post-verdict review of the death sentence by the trial court does not satisfy constitutional standards because the trial court may consider hearsay evidence contained in a pre-sentence report and is not required to set aside the death sentence upon a showing of good cause. Rejected in *Johnson*, 259 Va. at 667-68, 529 S.E.2d at 776; *Walker*, 258 Va. at 61, 515 S.E.2d at 569; *Cherrix*, 257 Va. at 299-300, 513 S.E.2d at 647; *Breard v. Commonwealth*, 248 Va. 68, 76, 445 S.E.2d 670, 675-76, *cert. denied*, 513 U.S. 971, 115 S.Ct. 442, 130 L.Ed.2d 353 (1994).

F. The trial court's refusal to permit the defendant to question prospective jurors individually during voir dire violates the defendant's constitutional right to a fair and impartial jury. Rejected in *Cherrix*, 257 Va. at 300, 513 S.E.2d at 647; Goins, 251 Va. at 453, 470 S.E.2d at 122; *Swann*, 247 Va. at 228, 441 S.E.2d at 200.

G. The trial court's refusal to permit the defendant to make additional peremptory strikes as an added procedural safeguard in death penalty cases fails to ensure the defendant's constitutional rights. Rejected in *Walker*, 258 Va. at 64, 515 S.E.2d at 571; *Clagett v. Commonwealth*, 252 Va. 79, 85, 472 S.E.2d 263, 266-67 (1996), *cert. denied*, 519 U.S. 1122, 117 S.Ct. 972, 136 L.Ed.2d 856 (1997); *Swann*, 247 Va. at 227, 441 S.E.2d at 199.

H. This Court's proportionality review in death penalty cases, as presently conducted, unconstitutionally denies defendants meaningful review because this Court fails to give appropriate consideration to cases in which sentences of life imprisonment are imposed. Rejected in *Bailey v. Commonwealth*, 259 Va. 723, 740-41, 529 S.E.2d 570, 580-81 (2000).

V. MOOT ISSUE

Lovitt challenges the constitutionality of the Virginia death penalty statutes on the basis that the aggravating factor of vileness, as set forth in Code § 19.2-264.4(C), is unconstitutional both on its face and as applied to his case. He bases this argument on his assertion that the statutory terms are unconstitutionally vague. However, we do not address Lovitt's arguments regarding this issue, because the jury elected to base his sentence of death only on the "future dangerousness" predicate. When a death sentence is based solely on "future dangerousness," all issues related to the "vileness" predicate are rendered moot. *See Swann*, 247 Va. at 228 n. 2, 441 S.E.2d at 200 n. 2; *Fisher v. Commonwealth*, 236 Va. 403, 414, 374

S.E.2d 46, 53 (1988), *cert. denied,* 490 U.S. 1028, 109 S.Ct. 1766, 104 L.Ed.2d 201 (1989).

VI. ADDITIONAL CONSTITUTIONAL CHALLENGE

Lovitt argues that the "future dangerousness" aggravator is unconstitutionally "vague as applied," because this Court has allowed the language of this aggravating factor to be applied in an "unfettered" manner in several other of the capital murder convictions that the Court has upheld on appeal. We find no merit in this argument, because our determination of the sufficiency of the evidence of "future dangerousness" in other cases does not provide a basis for reversing the jury's finding of "future dangerousness" in Lovitt's case. Lovitt's allegation that the evidence in his case of "future dangerousness" was insufficient as a matter of law must be determined based on the facts of his own case. Thus, the application of the "future dangerousness" predicate in other cases does not affect the question whether Lovitt's death sentence should be upheld.

VII. JURY SELECTION

Lovitt argues that the trial court abused its discretion in refusing to strike one juror for cause after she stated with visible emotion that about ten years earlier, when she was a student at the University of Florida, five neighbors whom she did not know were murdered. We disagree with Lovitt's argument.

On appellate review, we give deference to the trial court's determination whether to exclude a prospective juror, because the trial court was able to see and hear each member of the venire respond to the questions posed. Thus, the trial court is in a superior position to determine whether a juror's responses during *voir dire* indicate that the juror would be prevented or impaired in performing the duties of a juror as required by the court's instructions and the juror's oath. *Vinson v. Commonwealth*, 258 Va. 459, 467, 522 S.E.2d 170, 176 (1999), *cert. denied,* --- U.S. ----, 120 S.Ct. 2226, 147 L.Ed.2d 257 (2000); *Stewart v. Commonwealth*, 245 Va. 222, 234, 427

S.E.2d 394, 402, *cert. denied,* 510 U.S. 848, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993). A trial court's decision on this issue will not be disturbed on appeal absent a showing that the trial court abused its discretion. *Vinson*, 258 Va. at 467, 522 S.E.2d at 176; *Roach*, 251 Va. at 343, 468 S.E.2d at 109.

In conducting our review, we consider the juror's entire *voir dire,* not merely isolated statements. *Vinson*, 258 Va. at 467, 522 S.E.2d at 176; *Clagett*, 252 Va. at 90, 472 S.E.2d at 269; *Mackall v. Commonwealth*, 236 Va. 240, 252, 372 S.E.2d 759, 767 (1988), *cert. denied,* 492 U.S. 925, 109 S.Ct. 3261, 106 L.Ed.2d 607 (1989). In the present case, the juror was asked whether her experience in Florida would make it difficult for her to serve as a juror. She replied, "I think it is something that I would find emotionally challenging, but at the same time, if I was picked as a juror, I would be able to do my duty." In response to a question whether her experience made her predisposed to the death penalty, the juror stated that the Florida case "has nothing to do with this case, I'm sure." In addition, the juror responded in the affirmative when asked whether she could "keep an open mind" in deciding the case.

The above responses are illustrative of the entire *voir dire* of the juror, which contains no indication that the trial court abused its discretion in accepting her statement that she could fulfill the duties of a juror in the trial of the case. Thus, we conclude that the trial court did not abuse its discretion in refusing to strike this juror for cause from the jury panel.

VIII. GUILT PHASE ISSUES

Lovitt argues that the trial court erred when it permitted Detective Irv Ellman to testify concerning witness Casel Lucas's reputation for truth and veracity. Lovitt objected to Detective Ellman's testimony prior to its admission on the grounds of relevance. When the Commonwealth responded that Detective Ellman would testify concerning Lucas's reputation for truthfulness in the police community, and the trial court ruled that the testimony was admissible, Lovitt made

no further objection. Ellman then testified, as stated above, that he had known Lucas since 1994, that he knew others in the law enforcement community who knew Lucas, and that Lucas had a good reputation in that community for being truthful.[1]

After the Commonwealth rested its case and the trial court denied Lovitt's motion to strike the evidence, Lovitt moved the court to strike Ellman's testimony on two new grounds. First, Lovitt argued that the Commonwealth had failed to lay a foundation for Ellman's testimony and had established only that Lucas had admitted his involvement in 14 felony offenses. Second, Lovitt asserted that the "police community" was "too small a group and not a proper group" upon which to base testimony about Lucas's reputation for truthfulness. The prosecutor did not object to the timeliness of these new objections and, after the trial court considered counsel's arguments, it upheld its earlier ruling that Ellman's testimony was admissible and denied Lovitt's motion to strike the testimony.[2]

This sequence of events reveals that after the Commonwealth rested its case, Lovitt presented to the trial court new challenges to previously admitted evidence. In essence, Lovitt was requesting that the evidence be reopened so that Ellman's testimony could be stricken and the jury instructed to disregard it. Our holdings in *Woodson v. Commonwealth*, 211 Va. 285, 288, 176 S.E.2d 818, 821 (1970);

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[1] Lovitt does not argue on appeal that the trial court erred in overruling the objection to Ellman's testimony that he made on the grounds of relevance. Since Lovitt has abandoned that argument on appeal, we do not consider the merits of that objection.

[2] On brief, Lovitt raises an additional, new argument that the trial court erred in refusing to strike Detective Ellman's testimony because it consisted only of Ellman's opinion, which was based on specific acts. Since Lovitt did not raise this argument at trial, we do not consider the argument here. Rule 5:25.

Poole v. Commonwealth, 211 Va. 258, 260, 176 S.E.2d 821, 823 (1970), make it abundantly clear that after the Commonwealth has rested its case, it is not error for the trial court to refuse a new objection that has been raised regarding previously admitted evidence. Here, the trial court considered the arguments of counsel and although the court did not rely on the timing of Lovitt's objections in making its ruling, the court rejected the objections, thus declining to reopen the evidence. Accordingly, the result that the trial court reached was proper under *Woodson and Poole*.[3]

Lovitt next argues that the trial court erred in permitting a probation officer to testify that Lovitt failed to appear for an appointment which was scheduled to take place five hours after the time of the killing. Lovitt also argues that the trial court erred in admitting into evidence a capias for Lovitt's arrest, which showed that Lovitt missed a required court appearance on the day following Dicks's killing. Lovitt concedes that this evidence of flight is "marginally probative," but contends that its prejudicial effect as evidence of prior bad acts outweighs its probative value. We disagree with Lovitt's arguments.

Flight by a defendant after the commission of a crime is probative evidence of guilt of that crime. Clagett, 252 Va. at 93, 472 S.E.2d at 271; *Boykins v. Commonwealth*, 210 Va. 309, 313-14, 170 S.E.2d 771, 774 (1969). The admission of such evidence of a potentially prejudicial nature is a matter submitted to the trial court's sound discretion for a determination whether the probative value of the evidence outweighs its prejudicial effect. *See Orbe v. Commonwealth*, 258 Va. 390, 402, 519 S.E.2d 808, 815 (1999), *cert. denied*, --- U.S. ----, 120 S.Ct. 1970, 146 L.Ed.2d 800 (2000); *Coe v. Commonwealth*, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986). Here, Lovitt's conduct tended to prove that immediately after

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[3] In light of our holding, we need not address the merits of the reasons given by the trial court underlying its denial of these two new objections.

the killing, he sought to avoid any contact with law enforcement officials and the courts. This evidence also directly rebutted the assertion of defense counsel during opening argument that Lovitt did not avoid contact with the police in the days following the killing. Thus, the trial court did not abuse its discretion in balancing the probative value of this evidence against its potential prejudicial effect that Lovitt had disregarded his probation officer's instructions and was being sought by the police for failure to appear at a court hearing of an unspecified nature.

Lovitt next argues that the trial court erred in denying his motion to strike the capital murder charge on the ground that the evidence was insufficient as a matter of law. He notes that Jose Alvarado, one of two witnesses to the killing, was unable to identify Lovitt at the preliminary hearing as Dicks's assailant and, at trial, was only "80% certain" that Lovitt was the assailant. Lovitt also contends that the testimony concerning the Cadillac automobile parked in the pool hall lot, and the fact that Warren Grant's blood and fingerprints were found on the cash register drawer while Lovitt's were not, "favor[ ] Lovitt's innocence." Lovitt also observes that the DNA found near the handle of the scissors, which failed to exclude Lovitt as its donor, also failed to exclude Grant. Thus, Lovitt argues, the totality of the evidence "does not rise to the 'beyond a reasonable doubt' standard." We disagree with Lovitt's arguments.

The evidence, viewed in the light most favorable to the Commonwealth, is sufficient to support the jury verdict. As stated above, the jury received evidence that Lovitt had an immediate need for money. He had worked at the pool hall, and he was familiar with the employee work shifts and the location of cash kept on the premises. Also, he knew that he could pry open the cash register drawer with a pair of scissors, as he had done on an earlier occasion. Lovitt was seen at the pool hall earlier in the evening when he was unsuccessful in his attempt to obtain money from some people he knew. Later,

the bartender at the pool hall, who did not know Lovitt, noticed that a pitcher containing some cash was missing from beneath the bar in an area where a man matching Lovitt's general description had been standing.

Officer Holland testified that a person matching Lovitt's general description was in the pool hall about 3:00 a.m., shortly before the killing. Jose Alvarado, who witnessed the killing, testified that he was "80% certain" that Lovitt was Dicks's assailant.

A pair of scissors belonging to the pool hall was identified as the murder weapon and was found in the woods that led from the pool hall to Grant's house. Lovitt could not be eliminated as a possible source of the DNA found on the murder weapon.

Grant and his friend, Delores Harris, testified that Lovitt appeared at Grant's house, which was a short distance from the pool hall, in the very early morning hours of the day in question, carrying a cash register drawer that was later determined to have been taken from the pool hall. After Grant pried open the drawer, Lovitt divided the money with Grant.

At the time he was arrested, Lovitt volunteered to the police officer collecting his clothes that he was not wearing the jacket "when it happened." Lovitt later admitted his commission of the crime to Casel Lucas. Several aspects of this confession were corroborated by other evidence, such as the evidence that Lovitt was unable to open the cash register drawer at the time of the offense, and evidence that Lovitt fled to Grant's house after the killing. In addition, there was evidence corroborating Lucas's statement that Lovitt told him that he decided to kill Dicks because he could identify Lovitt. Dicks would have been able to identify Lovitt based on his earlier employment at the pool hall.

Lovitt's attacks on the credibility of Alvarado, Grant, Harris, Davis, Boyd, and Lucas were resolved against Lovitt by the jury's determination of Lovitt's guilt. Thus, based on the

above-stated evidence, and the reasonable inferences that can be drawn from the evidence, we conclude that the evidence is sufficient to support the jury's determination of guilt on the capital murder charge.

Lovitt next argues that the trial court erred in refusing to permit Lovitt's counsel to testify after Carol Palmer, a forensic witness, made a statement during cross-examination that allegedly was inconsistent with a statement she had made to Lovitt's counsel prior to trial. Lovitt's counsel requested that he be allowed to testify that in an earlier telephone conversation with him, Palmer replied in the affirmative when he asked her, "[W]ould you expect there to be a blood transfer from the victim to the perpetrator?" Lovitt asserts that the trial court abused its discretion in denying his counsel's request to withdraw from the case and allow his co- counsel to complete Lovitt's defense.

In response, the Commonwealth contends that Lovitt did not argue in the trial court that he should be allowed to withdraw and have his co-counsel continue representing Lovitt. The Commonwealth asserts that, instead, Lovitt's counsel argued that he should be permitted to testify and then continue to represent Lovitt along with his co-counsel. We agree with the Commonwealth's argument.

At the time he asked the court to be allowed to testify concerning his telephone conversation with Palmer, Lovitt's counsel did not request to withdraw from his representation of Lovitt and have co-counsel remain as sole counsel in the case. Lovitt's counsel asserted only that because "something [came] up in the middle of the trial that was unexpected and unanticipated [,] ... I can testify." Since Lovitt's counsel did not argue to the trial court that he should be allowed to withdraw from the case and co-counsel continue Lovitt's representation, we will not consider that argument on appeal. Rule 5:25.

IX. SENTENCING PHASE ISSUES

Lovitt contends that the trial court erred in denying his request to argue to the jury that he would die in prison if given a sentence of life imprisonment without the possibility of parole. We disagree.

There is no evidence in the record to support such an argument, which is speculative in nature. Moreover, the argument is incorrect as a matter of law, since prisoners who have received a sentence of life imprisonment without possibility of parole are not precluded from receiving executive clemency for crimes they have committed. *See* Va. Const. art. V, § 12. In addition, we observe that the jury was instructed that the words "imprisonment for life" mean "imprisonment for life without the possibility of parole." Lovitt was permitted to argue to the jury that he would not be eligible for parole. In fact, Lovitt argued that "he can die in prison just because of the nature of prisons. He can die in there. And we certainly know that he is not eligible for parole."

Lovitt next contends that the evidence is insufficient to support the jury's finding of "future dangerousness." Lovitt argues that his prior burglary, larceny, and narcotics convictions are not evidence of "future dangerousness," and that his aggressive behavior while incarcerated never resulted in criminal charges being brought against him. He also argues that, since he is ineligible for parole after being convicted of these offenses, the only society that should be considered in this case for purposes of "future dangerousness" is prison society. We disagree with Lovitt's arguments.

Under Code § 19.2-264.2, the death penalty may not be imposed unless the trier of fact finds one or both of the two aggravating factors that we have referred to as "future dangerousness" and "vileness." *Roach*, 251 Va. at 347, 468 S.E.2d at 111-12; *Yeatts v. Commonwealth*, 242 Va. 121, 139, 410 S.E.2d 254, 265 (1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992). In the present case, the

jury found "future dangerousness," meaning that "there is a probability that [Lovitt] would commit criminal acts of violence that would constitute a continuing serious threat to society." Code § 19.2-264.2.

This Court has recognized that the facts and circumstances surrounding a capital murder may be sufficient, standing alone, to support a finding of "future dangerousness." *See* Roach, 251 Va. at 348, 468 S.E.2d at 112; *Murphy v. Commonwealth*, 246 Va. 136, 145, 431 S.E.2d 48, 53, *cert. denied*, 510 U.S. 928, 114 S.Ct. 336, 126 L.Ed.2d 281 (1993). Here, Lovitt murdered Dicks, an innocent employee, to facilitate a robbery and to avoid being identified as its perpetrator. The jury was entitled to find that this violent, calculated action was strong evidence that Lovitt is a dangerous person who would commit future criminal acts of violence.

In addition, the jury was entitled to consider Lovitt's extensive criminal record, which we have recited in detail. This record includes an attempted robbery conviction and three burglary convictions. As we observed in *Yeatts*:

> Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation--the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.

242 Va. at 140, 410 S.E.2d at 266 (citations omitted). Thus, Lovitt's prior burglary convictions, in addition to his attempted robbery conviction, were relevant evidence in determining his "future dangerousness."

The jury also heard evidence that Lovitt committed several criminal offenses while released in the community on supervised probation or parole. This evidence demonstrated that Lovitt did not refrain from further serious criminal activity,

even when the consequences of such criminal behavior would be especially severe.

We find no merit in Lovitt's argument that the only relevant "society" for the jury's consideration of his "future dangerousness" was prison society. Code § 19.2-264.2 requires that the jury make a factual determination whether the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society." The statute does not limit this consideration to "prison society" when a defendant is ineligible for parole, and we decline Lovitt's effective request that we rewrite the statute to restrict its scope. Thus, we conclude that the evidence of the present offenses and of Lovitt's prior criminal behavior, including the evidence of his behavior while incarcerated for earlier offenses, is sufficient to support the jury's finding of "future dangerousness."

X. SENTENCE REVIEW

Passion and Prejudice

Under Code § 17.1-313(C), we review the death sentence imposed on Lovitt to determine whether it (1) was imposed under the influence of passion, prejudice, or any other arbitrary factor; or (2) is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Lovitt argues that his sentence was based on passion, prejudice, and arbitrariness because, during the trial, Dicks's family sat in the three rows of seats closest to the jury box. Lovitt contends that the jury showed its prejudice by the contents of two notes that it sent to the judge on the second day of the guilt phase trial, and by the fact that it reached its verdict in the guilt phase trial in one and one-half hours. We find no merit in this argument.

In the first note at issue, the jury asked whether Lovitt had been identified before the trial in a police "lineup." While the trial court and counsel were discussing this question, the jury sent the judge a second note, requesting that all personal

information about the jurors be removed from the public record in the case. In response to these notes, the trial court cautioned the jury to restrict its consideration of the case to the evidence presented. The court also informed the jury that the court would not tolerate any interference or intimidation from any outside source, and that any such conduct would be quickly addressed. In response to questioning by the court, the jurors indicated that no outside source had attempted to influence them, and that they had not discussed the case with anyone else.

These notes from the jury do not provide any indication of passion or prejudice, and the trial court's responses to them were proper. In addition, the record does not show that the jurors knew the identity of the spectators who sat in the seats nearest the jury box. Moreover, the length of time that the jury deliberated in the guilt phase trial did not indicate passion or prejudice on its part and, if anything, reflected the overwhelming nature of the evidence presented against Lovitt.

Excessiveness and Proportionality

Lovitt argues that the trial court erred when it denied his motion to commute the sentence to life imprisonment "based upon a proportionality review of similar cases." We find no merit in this argument.

Initially, we observe that the death penalty statutes do not require a proportionality review by the trial court. Instead, Code § 19.2-264.5 directs that "[a]fter consideration of the [post-sentence] report, and upon good cause shown, the [trial] court may set aside the sentence of death and impose a sentence of imprisonment for life." This provision permits the capital murder defendant the same opportunity as any other criminal defendant, under a precise and unambiguous standard, to request that the trial court alter the jury's verdict. Bassett v. Commonwealth, 222 Va. 844, 860, 284 S.E.2d 844, 854 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982). Here, after hearing argument from Lovitt's counsel comparing the facts and circumstances of Lovitt's case and the

sentences imposed, with the facts and circumstances of other capital murder cases and the sentences imposed in those cases, the trial court declined to exercise its discretionary authority under the statute to impose a sentence of life imprisonment. Based on the record before us, we conclude that the trial court did not abuse its discretion in declining to alter the sentence fixed by the jury.

In conducting this Court's proportionality review, we must determine whether "other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Johnson*, 259 Va. at 683, 529 S.E.2d at 786 (quoting *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993)). We have compared the record in the present case with the records of other capital murder cases, including those in which a sentence of life imprisonment was imposed. We also have examined the records of all capital cases reviewed by this Court pursuant to Code § 17.1-313(E). Since the jury imposed the death sentence based on the "future dangerousness" predicate, we give particular consideration to other capital murder cases in which the death penalty was obtained under that predicate.

Lovitt has directed our attention to certain capital murder convictions in which sentences of life imprisonment were imposed. However, under our proportionality review, we must consider whether juries *generally* impose a death sentence for conduct similar to that of the defendant, not whether certain juries have declined to impose the death sentence in other particular cases. *Jackson v. Commonwealth*, 255 Va. 625, 636, 499 S.E.2d 538, 545 (1998), *cert. denied*, 525 U.S. 1067, 119 S.Ct. 796, 142 L.Ed.2d 658 (1999); *King v. Commonwealth*, 243 Va. 353, 371, 416 S.E.2d 669, 679, *cert. denied*, 506 U.S. 957, 113 S.Ct. 417, 121 L.Ed.2d 340 (1992); *Stamper v. Commonwealth*, 220 Va. 260, 283-84, 257 S.E.2d 808, 824

(1979), *cert. denied,* 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

The record shows that Lovitt planned to commit the offense of robbery and murdered Dicks for the sole reason of eliminating any witness to the robbery. The multiple stab wounds inflicted on Dicks reflect an escalation of the violent and dangerous criminal activity detailed in Lovitt's prior criminal record. As stated above, Lovitt's prior record includes numerous felony convictions, including a conviction for attempted robbery and multiple convictions on burglary charges. Lovitt committed several of these prior crimes while on supervised probation or parole, which is further evidence of his continuing failure to refrain from serious criminal conduct.

We observe that juries in this Commonwealth, with some exceptions, generally have imposed the death sentence for convictions of capital murder based on a finding of "future dangerousness" in which the underlying predicate crime was robbery. *See, e.g., Jackson*, 255 Va. 625, 499 S.E.2d 538; *Roach*, 251 Va. 324, 468 S.E.2d 98, *Chandler v. Commonwealth*, 249 Va. 270, 455 S.E.2d 219, *cert. denied,* 516 U.S. 889, 116 S.Ct. 233, 133 L.Ed.2d 162 (1995); *Joseph v. Commonwealth*, 249 Va. 78, 452 S.E.2d 862, *cert. denied,* 516 U.S. 876, 116 S.Ct. 204, 133 L.Ed.2d 137 (1995); *Swann*, 247 Va. 222, 441 S.E.2d 195; *Chichester v. Commonwealth*, 248 Va. 311, 448 S.E.2d 638 (1994), *cert. denied,* 513 U.S. 1166, 115 S.Ct. 1134, 130 L.Ed.2d 1095 (1995); *Dubois v. Commonwealth*, 246 Va. 260, 435 S.E.2d 636 (1993), *cert. denied,* 511 U.S. 1012, 114 S.Ct. 1389, 128 L.Ed.2d 63 (1994); *Yeatts*, 242 Va. 121, 410 S.E.2d 254; *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276, *cert. denied,* 498 U.S. 882, 111 S.Ct. 229, 112 L.Ed.2d 184 (1990); *Mackall*, 236 Va. 240, 372 S.E.2d 759; *Townes v. Commonwealth*, 234 Va. 307, 362 S.E.2d 650 (1987), *cert. denied,* 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988). Based on this review, we hold that Lovitt's death sentence is neither excessive nor disproportionate to penalties imposed by

other sentencing bodies in the Commonwealth for comparable crimes, considering both the crime and the defendant.

XI. CONCLUSION

We find no reversible error in the judgments of the trial court. Having reviewed Lovitt's death sentence pursuant to Code § 17.1-313, we decline to commute the sentence of death. Accordingly, we will affirm the trial court's judgments.

Record No. 001015--*Affirmed.*

Record No. 001420--*Affirmed.*

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 12th *day of* January, 2001.

Robin Lovitt, Appellant,

against

Commonwealth of Virginia, Appellee.

Record Nos. 001015 and 001420

Circuit Court Nos. CR99-56 and CR99-57

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 3rd day of November, 2000 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

_____

Clerk

APPENDIX D

United States Constitution, Amendment VIII. Excessive Bail, Fines, Punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Va. Code § 19.2-264.3 Procedure for trial by jury.

A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment as provided in s 19.2-295.1.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is provided in s 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

Va. Code § 19.2-264.4 Sentence proceeding.

A. Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment. Upon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life. In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life.

A1. In any proceeding conducted pursuant to this section, the court shall permit the victim, as defined in s 19.2-11.01, upon the motion of the attorney for the Commonwealth, and with the consent of the victim, to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of s 19.2-299.1.

B. In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of s 19.2-299, or under any rule of court, shall not be admitted into evidence.

Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the

circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) the defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense, or (vi) mental retardation of the defendant.

C. The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

D. The verdict of the jury shall be in writing, and in one of the following forms:

(1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Signed ....., foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ....., foreman"

E. In the event the jury cannot agree as to the penalty, the court shall dismiss the jury, and impose a sentence of imprisonment for life.

Supreme Court, U.S.
FILED
JUN 13 2001
CLERK

No. 00-1703

In The

Supreme Court of the United States

ROBIN LOVITT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Is there any compelling reason to review the Virginia Supreme Court's decision, predicated on settled law, that evidence of unadjudicated criminal conduct was admissible in the sentencing phase to prove future dangerousness?

2. Is there any compelling reason to review the eleven other rulings of the Virginia Supreme Court which the petitioner refers to in summary fashion, including state law matters, discretionary trial court rulings, the sufficiency of the evidence and the constitutionality of the "future dangerousness" aggravating factor?

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STATEMENT OF THE CASE

I. Proceedings

Robin Lovitt was tried on September 20, 1999, by a jury in the Circuit Court of Arlington County, Virginia and found guilty of the November 18, 1998, capital murder of Carlton Dicks during the commission of robbery. The jury also found Lovitt guilty of robbery. In a separate sentencing hearing, the jury sentenced Lovitt to death for the capital murder and to life imprisonment for the robbery. The jury based the death sentence on the "future dangerousness" aggravating circumstance.

On March 1, 2000, the trial court held a post-verdict hearing at which it considered the probation officer's report, additional evidence and argument of counsel. The court imposed the sentences which had been fixed by the jury. On November 3, 2000, the Supreme Court of Virginia unanimously affirmed the convictions and sentences. *Lovitt v. Commonwealth*, 537 S.E.2d 866 (Va. 2000). On January 12, 2001, the Supreme Court of Virginia denied Lovitt's petition for rehearing. Lovitt filed his petition for a writ of certiorari in this Court on May 14, 2001.

II. Facts

The Supreme Court of Virginia found the facts regarding the guilt phase of trial to be as follows:

> The evidence showed that in the early morning hours of November 18, 1998, Clayton Dicks was stabbed six times in the chest and back while working during the overnight shift at Champion Billiards Hall (the pool hall) in Arlington County.

A few months before the killing, Lovitt worked as a cook at the pool hall on an evening shift that ended when Dicks arrived to begin the overnight shift. Amy Hudon, the manager at the pool hall, testified that about two months before Dicks was killed, she had trouble opening a cash register drawer near a pool table and asked Lovitt to help her open the drawer. Lovitt opened it by "wedging" a pair of scissors into the drawer's latch. About two months before the killing, Lovitt quit working at the pool hall.

On November 17, 1998, the day before the killing, Lovitt went to the Arlington home of his cousin and tried to sell him a television set. The same day, Lovitt spoke to an acquaintance in a failed attempt to find a job.

Later that night, Lovitt went to the pool hall between 8:00 and 10:00 p.m. and spoke with people he knew. When Lovitt asked some of them for money, each refused his request. Two of these people recalled that Lovitt wore a flannel shirt that night. The bartender that night, Thomas Schweiker, did not know Lovitt but remembered giving matches to a man leaning over the bar. Later, Schweiker noticed that a pitcher containing cash from cigarette sales was missing from beneath the bar where the man had been leaning. Schweiker testified that the man, an African-American in his middle or late twenties, had a stocky build and facial hair, and was wearing a plaid flannel shirt.

Dicks arrived at the pool hall between 1:30 and 2:00 a.m. The other employees present when Dicks arrived had left the pool hall by 3:00 a.m., leaving Dicks as the sole employee on the premises. The last four patrons in the pool hall

that morning left between 2:45 and 3:00 a.m. One of these patrons was Officer Dennis A. Holland of the United States Capitol Police, who was a long-time patron at the pool hall. Holland testified that he saw a man who looked "familiar" enter the pool hall as he and his friends were leaving. Holland described the man as being black, about five feet, ten or eleven inches tall, weighing between 185 and 190 pounds, and wearing a flannel shirt.

About 3:25 a.m., Jose N. Alvarado and Carlos Clavell entered the pool hall and saw two men arguing behind the bar. Alvarado testified that one man was shorter than the other, and that the shorter man repeatedly shoved the taller man, who was wearing an apron. Alvarado stated that he and Clavell watched as the shorter man stabbed the taller man six or seven times with a silver-colored weapon. Alvarado saw blood on the taller man's apron and watched as the taller man fell to the floor behind the bar. Clavell testified that he heard the taller man begging the shorter man to stop attacking him. Both Alvarado and Clavell saw the assailant repeatedly kick the man who had fallen to the floor.

Alvarado and Clavell immediately ran from the pool hall to a service station, where Alvarado telephoned the "911" emergency response number and reported what they had seen. Although Alvarado could not identify Lovitt as Dicks's assailant at the preliminary hearing held in this case, Alvarado testified at trial that he was about "80% certain" that Lovitt was the assailant.

When police and emergency medical personnel arrived at the pool hall in response to Alvarado's telephone call, they found Dicks lying on the floor behind the bar in a pool of blood. Dicks was alive but was unable to speak and was taken by helicopter to a nearby hospital. The multiple stab wounds prevented his heart from functioning, and he died while awaiting surgery.

Dicks had been stabbed six times, five times in the chest and once in the back. Four of these wounds were lethal. Dicks also suffered two areas of internal hemorrhage on both sides of his head, as well as external abrasions on both shoulders and on his left knee.

The police recovered from the pool hall a cash register that was lying on the floor near where Dicks was found. The register was broken into pieces, the cash drawer had been removed from the register and was missing, and a torn piece of a ten-dollar bill was found nearby. A pair of scissors with orange handles that was usually kept in a container on the bar was missing. A police canine unit found an orange-handled pair of scissors bearing blood lying open in the woods about 15 yards behind the pool hall.

Warren A. Grant, Lovitt's cousin, testified that Lovitt arrived at Grant's home in the early morning hours of November 18, 1998. Grant lived about a quarter of a mile from the pool hall in a residential area located on the "other-side" of the woods. Grant stated that Lovitt knocked on his door sometime between 1:30 and 3:00 a.m. Lovitt was wearing a plaid shirt and entered the house carrying what looked like a

large, square, gray metal box. After Lovitt unsuccessfully tried to open the locked box, Grant eventually opened it by using a screwdriver to "pop" some of the screws securing the box. Lovitt removed money from the opened cash register drawer and divided the cash between himself and Grant. Lovitt left the cash register drawer with Grant and instructed him to "get rid of [it]." A few days later, Grant began cutting the cash drawer into pieces with tin snips and put them in a bag.

Grant's girlfriend, Delores L. Harris, testified that she was in Grant's house that morning and watched Grant and Lovitt open the cash register drawer. She noticed that Lovitt looked "sweaty" and gave him a towel.

On November 20, 1998, Arlington Detective Noel E. Hanrahan obtained pieces of the cash register drawer from Grant. Four days later, Lovitt was arrested and charged with the present offenses. At that time, he was wearing a plaid shirt and a dark jacket, and he told the police that he had been wearing the same clothes for the past few days. When Officer Stephen Ferrone collected Lovitt's clothing at the jail, Ferrone asked a detective whether he needed to seize Lovitt's jacket. Ferrone testified that, upon hearing this question, Lovitt stated, "I wasn't wearing it when it happened."

Julian J. Mason, Jr., a forensic scientist employed by the Virginia Division of Forensic Science, qualified as an expert witness on the subject of tool mark identification. He testified that the cash register drawer Grant surrendered to the police had been removed from the broken cash register found on the floor of the pool hall.

Mason also stated that the pry marks on the cash register drawer were made by the scissors that were found in the woods behind the pool hall.

Lawrence Abrams, an identification technician for the Arlington County Police Department, testified that he was not able to obtain fingerprints from the handle of the scissors due to its irregularly-shaped surface. The only identifiable fingerprints obtained in relation to the present crimes were Grant's fingerprints that were obtained from the cash register drawer.

Carol Palmer, a forensic scientist employed by the Virginia Department of Forensic Science, qualified as an expert witness on DNA testing. Palmer extracted human DNA from two places on the scissors, on a blade near the tip and on a blade near the finger loops. She also extracted blood from three small circular areas on the left front side of Lovitt's jacket, but the DNA tests were inconclusive and Palmer was unable to determine whether the blood on the jacket was human. Palmer found no blood on the flannel shirt, black jeans, or shoes that Lovitt was wearing when he was arrested.

Palmer testified that she performed DNA testing using the "polymerase chain reaction," or PCR, technique on the DNA extracted from the scissors. The DNA extracted from the tip of the scissors displayed a DNA profile that matched the DNA profile of Dicks. The profile derived from this sample did not match the DNA profiles of either Lovitt or Grant, thus eliminating both as contributors of this DNA. Palmer stated that the chance of someone other

than Dicks contributing the DNA sample on the tip of the scissors was 1 in more than 5.5 billion.

The DNA extracted from the mid-section of the scissors also matched the DNA profile of Dicks. However, Palmer stated that this DNA evidence, unlike the DNA evidence from the tip of the scissors, did not exclude either Lovitt or Grant and, thus, was inconclusive as to them.

After Lovitt's arrest, he was incarcerated in the Arlington County Jail in the same unit as Casel Lucas. Lovitt and Lucas developed a friendship during the two months that they lived together in this unit. Lovitt first told Lucas that after leaving the bathroom at the pool hall on the night of the murder, Lovitt saw a Hispanic man stabbing Dicks. Lovitt told Lucas that, at that time, Lovitt saw the cash register drawer, grabbed it, and ran from the pool hall.

According to Lucas, Lovitt later stated that he knew Dicks and was aware that no one else would be in the pool hall late at night. Lovitt further related that he waited in the bathroom until everyone left the pool hall before coming out of the bathroom to attempt to open the cash register drawer. Dicks confronted Lovitt as he unsuccessfully attempted to open the cash drawer. Lovitt told Lucas that he had to kill Dicks because Dicks had recognized him. According to Lovitt, Dicks asked him, "Why [are] you doing this?" Lovitt admitted to Lucas that he stabbed Dicks several times and took the cash register drawer to his cousin's house where he and his cousin split the money before leaving to buy some drugs. Lovitt told Lucas that he discarded the murder weapon while en route to or from Grant's house, and that he changed his

> clothes at Grant's house because he had blood on his shirt and pants.

Lovitt, 537 S.E.2d at 870-73.

The Supreme Court of Virginia found the facts regarding the sentencing phase of trial to be as follows:

> During the penalty phase of the trial, the Commonwealth presented evidence of Lovitt's criminal record. In October 1975, when Lovitt was 11 years old, he was charged with assault and placed in protective supervision. Also as a juvenile, in August 1979, Lovitt was committed to the Beaumont Learning Center of the State Department of Corrections (Beaumont) based on adjudication of charges of breaking and entering and larceny. While at Beaumont, Lovitt was disciplined for fighting, assault, and possessing contraband items. After his release from Beaumont in 1980, Lovitt was convicted of grand larceny in 1981 and was sentenced to 12 months in jail.
>
> Between 1983 and 1985, Lovitt was convicted of petit larceny, grand larceny, breaking and entering, and distribution of marijuana. In 1986, Lovitt was convicted of attempted robbery and was sentenced to a term of imprisonment of from one to three years. After being released on parole in August 1987, Lovitt's parole was revoked in August 1988 based, in part, on additional arrests and his failure to pass certain drug tests. Lovitt later was convicted of statutory burglary and grand larceny. While incarcerated on these convictions and the parole violation, Lovitt was disciplined for damaging property and for fighting.

In September 1990, Lovitt again was released on parole. In early 1991, Lovitt was convicted of possession of cocaine, grand larceny, and burglary. While incarcerated on these charges, Lovitt was the subject of ten disciplinary actions for offenses including possession of contraband, disobeying direct orders, assault, possession of intoxicants, and manufacturing "shank handles." After being released on parole in October 1996, Lovitt was convicted in 1997 of possession of marijuana, petit larceny, unlawful entry, assault and battery, and destruction of property. Lovitt was on parole at the time of the present offenses.

In October 1998, Arlington County Police Officer Jerome A. Lee detained Lovitt in an apartment parking lot in Arlington. Lovitt had parked his car behind the apartments, appeared to be very nervous, and consented to a search of his vehicle. Lee found a long kitchen knife on the floor of the passenger area and a soda can used to smoke crack cocaine in the rear floor area of the vehicle.

Lovitt presented testimony from his sister, Amanda Jones, who testified that Lovitt was the oldest of 12 children and that he helped take care of his younger siblings, although not "gladly." Lovitt also presented testimony from four deputies employed by the Arlington County Sheriff's Office, who stated that Lovitt had not presented any disciplinary problems while being held in jail on the present charges.

Lovitt, 537 S.E.2d at 873.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

Summary

Lovitt's petition confuses two legal principles: the *burden of proof* required for guilt and the *admissibility of evidence* at a capital sentencing hearing. This case presents no question of whether the State must prove the elements of an offense to establish a defendant's guilt beyond a reasonable doubt but rather whether the due process standard of *proof of guilt* can be imported into the arena of *admissibility* of evidence in a sentencing proceeding and specifically applied as some sort of threshold requirement as each fact or piece of evidence is admitted. By asking this Court to require that state trial courts in capital sentencing proceedings apply a "burden of proof" standard to *each fact* or piece of evidence before it can be admitted, Lovitt essentially is asking that the State meet *multiple* burdens of proof, first for each fact or piece of evidence and then again for the ultimate fact at issue, *i.e.*, the aggravating factor and/or recommended sentence. Nothing in this Court's precedents, however, supports such an extraordinary requirement regarding the admissibility of evidence and in fact this Court has made clear that the Constitution requires no "standard of proof" for *admissibility*. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986). Lovitt's "conflict among the States and federal circuits" argument attempts to further confuse these two distinct trial processes and does not demonstrate any unsettled question regarding the admissibility of evidence. Lovitt's characterization of the evidentiary procedures in Virginia, the unadjudicated evidence in his

case and its possible effect, are incorrect in any event, and cannot support a grant of the writ of certiorari.

I. The Virginia Supreme Court's Rejection Of Lovitt's Challenge To The Admission Of Evidence Of Unadjudicated Conduct Presents No Compelling Reason To Grant Certiorari.

In the appeal below, Lovitt made the summary, boiler-plate argument that "the Virginia statute violates the Eighth and Fourteenth Amendments' [sic] heightened reliability requirement for capital sentencing because it allows the sentencer to prove the statutory aggravating factor of future dangerousness by evidence of unadjudicated criminal conduct. It fails to satisfy any standard of proof before such conduct may be used." (Opening Br. of Def. at 25).[1] The Virginia Supreme Court rejected the claim in the "Issues Previously Decided" section of its opinion, citing to three previous opinions where the court had rejected the same claim. *Lovitt*, 537 S.E.2d at 874.

Lovitt claims that certiorari should be granted because there allegedly is a conflict among the States and federal circuits over the issue and because Virginia takes the "extreme position that such evidence is *per se* admissible under the federal constitution because the jury should have before it *'all possible relevant information* about the

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[1] In addition to this conclusory claim, Lovitt made one further reference to the issue in his reply brief, citing a law review article for the proposition that other States prohibit the use of unadjudicated conduct. (Reply Br. of Def. at 7).

individual defendant whose fate it must determine' " (Pet. at 9, emphases in original). He further alleges that, in his sentencing hearing, the jury was exposed to a plethora of unadjudicated conduct evidence, that this was unfair to him and violated the Due Process Clause of the Fourteenth Amendment. Lovitt's argument is both factually and legally flawed for several reasons. It certainly presents no matter which compels a grant of certiorari. *See* Sup. Ct. R. 10 (certiorari granted only for "compelling reasons").

A. The facts are not as Lovitt represents.

Lovitt misstates the record when he says that the unadjudicated evidence included the records submitted by the Commonwealth which showed that he had engaged in various assaultive behaviors during his years of incarceration as a juvenile and adult. (Pet. at 6). Those records hardly can be classified as "unadjudicated:" they are, rather, records of institutional due process hearings and findings made of punishable offenses. (Pet. at 6: VSC App. 2017-29, 2031-33) As the prosecutor accurately represented to the trial judge without objection, "these are documents that were – we took out all the opinion documents. The documents are from due process hearings that were had for infractions, serious incidents." (VSC App. 1658). *See Wolff v. McDonnell*, 418 U.S. 539, 564-65 (1974) (notice and opportunity to be heard in proceedings involving institutional offenses).

What Lovitt is left with to complain about are the unchallenged eyewitness accounts of law enforcement officers that (1) in 1998, an officer saw a knife in Lovitt's

car during a traffic stop, (2) in 1997, an officer found a razor in Lovitt's pants during an arrest, (3) in 1990, Lovitt tested positive for cocaine while on parole and (4) in 1998, Lovitt refused to go to substance abuse counseling at his parole supervisor's direction. Lovitt fails to articulate how any standard of proof requirement could have been violated by the admission of this evidence.[2] Obviously, even under Lovitt's proposed "beyond a reasonable doubt" standard, such was met for these facts.[3]

Lovitt also mischaracterizes the law governing admission of evidence in Virginia. According to Lovitt, because evidence of unadjudicated conduct is "per se" admissible, it comes in without any "shield" against "unreliable or unfairly prejudicial evidence" and "a defendant must suddenly defend himself against numerous different charges." (Pet. at 17-18). Of course this is not the case. In Virginia, evidence is admissible only if it is relevant and the test for relevancy is whether "the legitimate probative value outweighs the incidental prejudice to the accused." *Hawks v. Commonwealth*, 321 S.E.2d 650, 652 (Va. 1984). Moreover, in all Virginia capital

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[2] Lovitt also completely ignores the mammoth number of criminal records presented which showed that over the course of many years he had been found guilty of and punished for many violent crimes, including larcenies, burglaries, drug offenses, assaults and attempted robbery. (VSC App. 1936-2016). This extensive, unchallenged "*adjudicated* conduct" evidence simply renders *any* argument Lovitt has regarding the admission of *un*adjudicated conduct evidence harmless beyond any reasonable doubt.

[3] The same can be said for the records which showed that Lovitt had been found to have committed, and punished for committing, various serious institutional infractions.

murder trials, upon motion by the defendant, the Commonwealth must give notice of its intention to use evidence of unadjudicated conduct, including a description of the conduct and the time and place it is alleged to have occurred. Va. Code § 19.2-264.3:2. Lovitt made such a motion and the Commonwealth complied with the statutory mandate. Other matters aside, Lovitt certainly cannot complain about having "suddenly" to defend himself against *any* evidence.[4]

B. The issue has been decided by this Court.

Whether framed as a question of admissibility *vel non* or one of admissibility with a standard of proof, the issue of whether a sentencer may consider evidence of a defendant's prior misconduct which has not previously been formally adjudicated is not new or even open. In *Williams v. New York*, 337 U.S. 241 (1949), this Court held that the Constitution allows a sentencer in a capital case to consider evidence of unadjudicated conduct. Lovitt's only argument around this controlling precedent is that *Williams* allegedly was called into question by *Gardner v. Florida*, 430 U.S. 349 (1977). But *Gardner* did not overrule

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[4] Lovitt says that certiorari should be granted in his case in part because the Court granted certiorari in *Gray v. Netherland*, 518 U.S. 152 (1996), but *Gray* does not help Lovitt. The issue in *Gray* was whether the Constitution required notice of the use of unadjudicated acts where it was uncontested that the prosecutor had not given the required notice before presenting extensive evidence of other murders. There was no question raised or considered in *Gray* concerning the admissibility *vel non* of such evidence; indeed, it is implicit in *Gray* that the evidence would be admissible if the alleged notice requirement were met.

or question the validity of *Williams*; rather, it held *Williams* not applicable because the evidence in *Gardner* had been kept confidential even from the defendant. *Gardner*, 430 U.S. at 356-57.

Lovitt's argument that *Williams* implicitly was overruled, and his suggestion that the precedent of *Williams* does not measure up to the more recent "heightened standard of reliability" requirement for capital cases, are belied by this Court's consistent reliance on *Williams* after *Gardner*. For example, in *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 635 (1997), *Witte v. United States*, 515 U.S. 389, 397 (1995), and *Nichols v. United States*, 511 U.S. 738, 747 (1994), the Court referenced *Williams* for the principle that evidence of unadjudicated crimes is appropriate to consider in sentencing. In *Schlup v. Delo*, 513 U.S. 298, 326 (1995), a capital case, the Court cited *Williams* for the principle that there is "reduced procedural protection" in the sentencing phase. *See also Dawson v. Delaware*, 503 U.S. 159, 163 (1992); *Payne v. Tennessee*, 501 U.S. 808, 857 (1991) (both citing *Williams*). Of course, in *Jurek v. Texas*, 428 U.S. 262, 276 (1976), the Court made clear that "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine" and in *Tuilaepa v. California*, 512 U.S. 967, 976-77 (1994), the Court specifically upheld against constitutional challenge the use of an aggravating factor requiring the sentencer to consider the defendant's violent "criminal activity," including unadjudicated conduct. Thus, there can be no doubt that the holding in *Williams* remains good law and obviates any need for a grant of certiorari to redetermine the same issue.

In *McMillan v. Pennsylvania*, the petitioners argued that before unadjudicated acts could be considered by the sentencer, they must be proven by at least clear and convincing evidence. The Court held as follows:

> petitioners do not and could not claim that a sentencing court may never rely on a particular fact in passing sentence without finding that fact by "clear and convincing evidence." Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. *See Williams* . . . . We see nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing.

477 U.S. at 91. The Court went on to observe that "we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, *e.g.*, *Profitt v. Florida*, 428 U.S. 242 (1976), without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92.

The reason for this rule is quite simple: "criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt." *McMillan*, 477 U.S. at 92 n.8. Sentencing involves the quite different concern of what punishment is appropriate for a crime which already has been proven beyond a reasonable doubt and requires the sentencer to "exercise a wide discretion in the sources and types of evidence" it will consider. *Williams*, 337 U.S. at 246; *Jurek*, 428 U.S. at 276 ("all possible relevant information"). Given this consistent precedent holding that the Constitution does not

require burdens of proof for particular evidence presented at a criminal sentencing, there is no call for a grant of certiorari on the matter.

Indeed, given this Court's holdings discussed above, Lovitt's "conflict" argument does not bear much discussion. He contends that state courts in Washington, Indiana, Alabama and Tennessee prohibit the use of unadjudicated conduct evidence altogether, but admits that Tennessee bases its prohibitive rule on *state* law. (Pet. at 11). Of the three remaining States, only one – Indiana – even mentions *Williams v. New York* in its decision prohibiting unadjudicated conduct evidence. The others certainly cannot represent any kind of "conflict" worthy of certiorari review when they do not even recognize this Court's controlling precedent on the matter. And the decision from Indiana – *State v. McCormick*, 397 N.E.2d 276 (Ind. 1979) – cannot be considered as a true "conflict" for at least two reasons. First, like petitioner, the court in *McCormick* misread *Gardner* as somehow overruling *Williams*, a conclusion, as discussed above, shown to be wholly inaccurate by *Gardner* itself. Second, the decision in *McCormick* appears to have been driven largely by the fact that, under *state* law, the statutory aggravating factor of an unadjudicated murder was required to be proven beyond a reasonable doubt and the Indiana court was unwilling to allow such "trials within trials" to occur. 397 N.E.2d at 278. This 1979 case simply does not present a conflict on any constitutional issue that compels a grant of certiorari.

Lovitt also discusses cases from three other States – Utah, California and Louisiana – which he says show a conflict with Virginia on the question of standard of

proof, but none of those cases even mentions *McMillan v. Pennsylvania*. (Pet. at 12-13). Moreover, they, like *McCormick*, turn mostly on the statutory scheme of each particular State: aggravating factors must be proven beyond a reasonable doubt; unadjudicated conduct is an aggravating factor; thus, the unadjudicated conduct must be proven beyond a reasonable doubt. On that point of logic, there is no conflict. Virginia also requires proof of aggravating factors beyond a reasonable doubt. *See* Va. Code § 19.2-264.4(C). Virginia, however, only allows two aggravating factors to be considered: future dangerousness and vileness. *See id.*[5] Virginia law does not require that each discrete piece of evidence admitted *to prove* an aggravating factor must *itself* be established by proof beyond a reasonable doubt. *See Walker v. Commonwealth*, 515 S.E.2d 565, 571-72 (Va. 1999) (relying on *McMillan*), *cert. denied*, 528 U.S. 1125 (2000). Lovitt shows no conflict with this undeniably constitutional practice.

Finally, Lovitt attempts to show a conflict among the federal courts of appeal on the standard of proof issue by arguing that because the Ninth Circuit has said that evidence of unadjudicated conduct must have "some minimal indicium of reliability beyond mere allegation," then that Circuit imposes a "standard of proof" that Virginia does not. (Pet. at 13). This argument is completely frivolous: "indicia of reliability" is an *admissibility* concern, not a "burden of proof" standard, and Virginia requires that evidence of unadjudicated conduct, like all evidence, be

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[5] Unadjudicated conduct is not an aggravating factor in Virginia. Evidence of unadjudicated conduct is admissible to prove the aggravating factor of future dangerousness.

both relevant and reliable for admission into evidence. *See Beaver v. Commonwealth*, 352 S.E.2d 342, 346-47 (Va. 1987), *cert. denied*, 483 U.S. 1033 (1987). Lovitt shows no conflict between Virginia and any federal circuit.

In the final analysis, all that Lovitt has shown is that some States have elected to prohibit the use of certain evidence in capital sentencing hearings and some have elected to specify as aggravating factors certain unadjudicated conduct by the defendant which must be proven beyond a reasonable doubt or some other standard of proof. States have the discretion to do so because,

> it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

McMillan, 477 U.S. at 85 (citations omitted). Virginia's statutory sentencing scheme, including the use of unadjudicated conduct evidence to prove the aggravating factor of future dangerousness, is authorized by the Due Process Clause as enunciated in *Williams* and *McMillan*. Lovitt presents no compelling reason why this Court should grant certiorari to revisit this settled law.

II. Lovitt's "Additional Errors" Argument Does Not Merit Review.

Lovitt argues in conclusory fashion that the Virginia Supreme Court made *eleven* other "errors," all of which merit a grant of certiorari. Lovitt, however, fails to identify a single issue that compels an exercise of the Court's extraordinary review power.

First "Error"

Lovitt first complains that the Virginia Supreme Court failed to conduct a proper "proportionality" review of his sentence pursuant to Virginia Code § 17.1-313(E). According to Lovitt, there never has been another death penalty case in Virginia where the murderer found the murder weapon at the scene of the robbery. This Court, however, may not grant certiorari to review this issue because it involves no federal issue. *See Pulley v. Harris*, 465 U.S. 37, 46 (1984) (proportionality review not required by the Constitution); Sup. Ct. R. 10. Moreover, as seen from the Virginia Supreme Court's opinion, the court undeniably conducted the sentence review required by state law. *Lovitt*, 537 S.E.2d at 880-81.[6]

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[6] Lovitt's assertion that there was no evidence of his intention to confront a victim, arm himself or use a weapon, is ludicrous. Lovitt knew the pool hall and where the money, scissors and manager were when he planned his robbery and planned to leave no witnesses. At least one other Virginia death penalty case involved the unimportant detail that the murderer picked up his weapon at the scene of the robbery. *See Correll v. Commonwealth*, 352 S.E.2d 352, 354 (Va.), *cert. denied*, 482 U.S. 931 (1987).

Second "Error"

Lovitt next complains that the Virginia Supreme Court erred because it did not find the trial court had abused its discretion by admitting evidence showing that Lovitt failed to show up for an appointment with his probation officer *five hours after the murder* or for an unrelated court appearance the *morning after the murder.* These evidentiary rulings do not involve any federal issue and thus may not support a grant of certiorari. *See Duncan v. Henry,* 513 U.S. 364, 366 (1995); Sup. Ct. R. 10. Moreover, as the court below found, the highly probative nature of this evidence of flight after a crime certainly outweighed any incidental, potential prejudicial effect. *Lovitt,* 537 S.E.2d at 876-77.

Third "Error"

Lovitt's next complaint presents no issue worthy of review: the decision to retain a juror who expressed emotion about the unrelated killings of fellow students ten years earlier, but who stated without reservation that she would not let that experience affect her duty to remain unbiased. The Virginia Supreme Court's unremarkable rejection of the claim, based on the discretion traditionally given to trial judges who see and hear the jurors, certainly presents no unsettled issue of law to be resolved by this Court. *See Lovitt,* 537 S.E.2d at 875.

Fourth "Error"

Lovitt further argues that the state court erred when it procedurally barred an assignment of error relating to a trial court ruling allowing testimony on reputation for truth and veracity. *See Lovitt,* 537 S.E.2d at 876. This issue without question involves only the application of state law; it involves no federal issue and thus may not support a grant of certiorari. *See* Sup. Ct. R. 10.

Fifth "Error"

Lovitt's fifth complaint is that the Virginia Supreme Court erred when it did not allow a sentencing phase jury instruction that the defendant would "die in prison" if given a life sentence. The court below did not allow such an instruction because it is not an accurate statement of Virginia law, *viz.*, prisoners may receive executive clemency. *Lovitt,* 537 S.E.2d at 878. Lovitt's jury was given the no-parole instruction required by *Simmons v. South Carolina,* 512 U.S. 154 (1994). He was entitled to no more.

Sixth "Error"

Lovitt's "insufficient evidence" complaint is frivolous. Under *Jackson v. Virginia,* 443 U.S. 307, 319 (1979), there can be no question but that the evidence was sufficient. *See Lovitt,* 537 S.E.2d at 877.

Seventh "Error"

His next complaint – that the Virginia Supreme Court procedurally barred a claim that his counsel should have been allowed to testify at trial allegedly to impeach a

Commonwealth's expert regarding a pretrial interview – clearly presents no federal issue. *See Lovitt*, 537 S.E.2d at 878 (applying Va. Sup. Ct. R. 5:25 requiring contemporaneous objection); U.S. Sup. Ct. R. 10.

Eighth "Error"

In his eighth complaint, Lovitt states in conclusory terms that the future dangerousness factor is unconstitutionally "vague" on its face and as applied and "the unadorned statutory terms are unconstitutionally vague." (Pet. at 26). Lovitt does not explain why he believes the factor is "vague" or what "terms" are "vague." These unexplained statements hardly show a compelling reason to grant certiorari. The Virginia Supreme Court's rejection of the claims – *Lovitt*, 537 S.E.2d at 874 – certainly involves no open question of law to be resolved. *See California v. Ramos*, 463 U.S. 992, 1002-03 (1983) (future dangerousness appropriate consideration at sentencing); *Jurek*, 428 U.S. at 275 (same).

Ninth "Error"

Lovitt next claims that the Virginia Supreme Court erred because it rejected his argument that his sentence was influenced by passion under Virginia Code § 17.1-313(C), based on the alleged fact that the victim's family sat near the jury during the trial. The Virginia Supreme Court's "arbitrariness" review of the sentence, however, is not required by the Constitution and thus may not support a grant of certiorari. *See Pulley v. Harris*. Moreover, as the court below noted, there was nothing in the record to support any finding of passion or prejudice,

much less any indication that the jury even knew who was sitting where in the courtroom. *Lovitt*, 537 S.E.2d at 879.

Tenth and Eleventh "Errors"

Lovitt's last two contentions require little comment. He complains that the Virginia Supreme Court rejected his arguments that he was entitled to individually question his prospective jurors and to receive more peremptory challenges than allowed by Virginia law. These issues, however, do not involve any federal issue. *See Mu'Min v. Virginia*, 500 U.S. 415, 430 (1991) (no constitutional right to individual voir dire); *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (no constitutional right to any peremptory challenges). The Virginia Supreme Court's rulings – *Lovitt*, 537 S.E.2d at 874 – do not, therefore, compel a grant of certiorari. *See* Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-1703

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

ROBIN LOVITT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF

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INTRODUCTION

There is no dispute that this petition presents the important and recurring question of federal law whether juries may consider evidence of other unadjudicated crimes in sentencing people to death, even when the government has met no burden of proof with respect to such evidence. Instead, the Commonwealth purports to argue that there is no split of authority on this issue. Its argument, however, is that the cases that disagree with the decision below do not cite the precedents the Commonwealth believes to be controlling. *See* Section I, below. The Commonwealth's contention therefore boils down to a *merits* argument that not only is wrong, but also underscores the need for this Court to reconcile its precedents, including the inapposite cases now relied upon by the Commonwealth. *See* Section II, below. Since there is no question that the state supreme courts are in conflict, and the question is properly presented on the record in this case, the Court should grant *certiorari* to resolve it now, before others are sentenced to death in this manner. *See* Section III, below.

I. THE COMMONWEALTH ALL BUT CONCEDES THAT THE STATE SUPREME COURTS ARE DIVIDED ON THIS IMPORTANT QUESTION OF FEDERAL LAW.

The Commonwealth asserts that "Lovitt's 'conflict' argument does not bear much discussion." Opp. 17. Mr. Lovitt agrees, given that the Supreme Court of Virginia has already acknowledged the "split of authority" on this issue. *Stockton v. Commonwealth*, 402 S.E.2d 196, 206 (Va. 1991). The Commonwealth nonetheless claims that the state supreme courts that conflict with the Supreme Court of Virginia "cannot represent any kind of 'conflict' worthy of certiorari review when they do not even recognize this Court's controlling precedent on the matter." Opp. 17. Of course, this is just a merits argument. The Commonwealth is not denying the conflict in holdings, it is just arguing that the other courts are wrong. (They are not, as explained in Section II , below.)

The Commonwealth also attempts to distinguish some – but by no means all – of the cases that split from the Supreme Court of Virginia's holding. By doing so, the Commonwealth only underscores its implicit concession that the cases it does not attempt to distinguish are in conflict with the decision below. (Those cases are *State v. Bartholemew*, 683 P.2d 1079 (Wash. 1984), and *Cook v. State*, 369 So. 2d 1251 (Ala. 1978).) Moreover, its attempts to distinguish the other cases make little sense. For example, the Commonwealth claims that *State v. McCormick*, 397 N.E.2d 276 (Ind. 1979), "cannot be considered as a true 'conflict'" because "the Indiana court was unwilling to allow . . . 'trials within trials' to occur" as a matter of federal constitutional law. Opp. 17. That point applies with equal force to this case, where the Commonwealth forced Mr. Lovitt to defend himself against numerous other charges.

The Commonwealth also claims, without citation, that cases from "Utah, California and Louisiana" are distinguishable because they "turn mostly on the statutory scheme of each particular State: aggravating factors must be proven beyond a reasonable doubt; unadjudicated conduct is an aggravating factor; thus, the unadjudicated conduct must be proven beyond a reasonable doubt." Opp. 17-18. Not so. In Louisiana, for example, there is no "unadjudicated crimes" aggravating factor, *see* La. Code Crim. Proc. art. 905.4.A; instead, the government sought to introduce the evidence as general "character and propensity evidence" – just as the Commonwealth used such evidence in Mr. Lovitt's trial as evidence of dangerous character. *See State v. Brooks*, 541 So. 2d 801, 811 (La. 1989) (citing La. Code Crim. Proc. art. 905.2). Similarly, prior crimes are considered aggravating circumstances in California and Utah only if the defendant has been *convicted* of those crimes. *See* Cal. Penal Code § 190.2; Utah Code § 76-5-202. The cases from these states are indistinguishable from, and in square conflict with, the decision below.

In an attempt to minimize this conflict, the Commonwealth claims that Mr. Lovitt "mischaracterizes the law" of Virginia

by stating that "evidence of unadjudicated conduct is '*per se*' admissible" under Virginia law. Opp. 13. The Commonwealth goes on to assert that "[o]f course this is not the case" because "evidence is admissible only if it is relevant and the test for admissibility is whether the legitimate probative value outweighs the incidental prejudice to the accused." *Id.* (internal quotation omitted). But the Commonwealth neglects to point out that the Supreme Court of Virginia has repeatedly held that evidence of unadjudicated conduct satisfies this standard as a matter of law. As that court has explained, "in *Beaver v. Commonwealth*, [352 S.E.2d 342 (Va. 1987)], we rejected a contention that evidence of unadjudicated criminal activity is 'not reliable.' And in *Gray v. Commonwealth*, [356 S.E.2d 157 (Va. 1987)], we rejected an argument that such evidence is 'highly inflammatory and inherently prejudicial.'" *Stockton*, 402 S.E.2d at 210 (affirming death sentence for this reason). The Commonwealth's citation of *Beaver* as standing for the contrary position, *see* Opp. 19, is mystifying. There is no question that the state supreme courts are divided, and that the Commonwealth has adopted an extreme rule of *per se* admissibility that most jurisdictions have rejected. *See* Pet. 9.

The federal courts of appeals are also divided. The Commonwealth does not even attempt to reconcile the decisions of the various circuits. Instead, it asserts that the Ninth Circuit's "indicia of reliability" requirement is irrelevant because it "is an *admissibility* concern, not a 'burden of proof' standard." Opp. 18 (emphasis added). That is no distinction at all, given that Mr. Lovitt has always argued that such evidence is inadmissible. *See* Pet. 16-20.

II. THE COMMONWEALTH'S INCORRECT MERITS ARGUMENTS SERVE ONLY TO UNDERSCORE THE NEED FOR THIS COURT TO RECONCILE ITS PRECEDENTS.

This Court's review is needed not only to resolve this conflict, but also to reconcile its precedents. As Mr. Lovitt explained in his opening brief, this case arises at the

intersection of two lines of this Court's precedents: one line holding that "all relevant evidence" is *generally* admissible at capital sentencing hearings, and another holding that a heightened standard of reliability governs such hearings. *See* Pet. 14-16. In response, the Commonwealth studiously ignores the second line of precedents, and instead relies on yet other, inapposite cases while arguing that Mr. Lovitt is "confus[ing]" different legal principles. Opp. 10. By doing so, the Commonwealth only underscores the need for this Court to clarify this important area of law.

At the outset, any confusion is the Commonwealth's, not Mr. Lovitt's. As the state supreme courts have concluded, there are two possible ways to apply the requirement of greater reliability to evidence of unadjudicated crimes. One is to exclude such evidence altogether; the other is to require the government to prove each alleged crime by a particular standard of proof before it may be considered by the jury. *See* Pet. 10-13. Either approach would require reversal of the Commonwealth's extreme rule of *per se* admissibility.

The Commonwealth argues that the first of these approaches is precluded by this Court's decision in *Williams v. New York*, 337 U.S. 241 (1949). But as Mr. Lovitt explained in his opening brief, this Court held nearly 25 years ago that the *relevant* holding of *Williams* is no longer good law. *See* Pet. 15 (citing *Gardner v. Florida*, 430 U.S. 349 (1977)). The Commonwealth claims that "*Gardner* did not overrule or question the validity of *Williams*; rather, it held *Williams* not applicable" on its facts. Opp. 14-15. Nonsense. The *Gardner* Court did "note" that *Williams* was not "directly applicable" on its facts. 430 U.S. at 356. But the Court *also* went on to hold that intervening precedents recognizing that "death is a different kind of punishment" now require the Court to "scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949," "when the *Williams* case was decided." *Id.* at 357.

In addition to ignoring the relevant holding of *Gardner*, the Commonwealth claims that this Court has relied on *Williams* since *Gardner*. Opp. 15. But none of the Commonwealth's cases address the *relevant* holding of *Williams*. The first three cases cited by the Commonwealth are not even death penalty cases, and thus have no bearing on the consideration of unadjudicated crimes in *capital* sentencings. *See id.* (citing *United States v. Watts*, 519 U.S. 148 (1997); *Witte v. United States*, 515 U.S. 389 (1995); and *Nichols v. United States*, 511 U.S. 738 (1994)). It is one thing for a sentencing *judge* to hear evidence before determining the length of a *prison* term; it is quite another for a lay *jury* to hear unreliable and prejudicial evidence when deciding whether to sentence a person to *death*. Not only is it well-established that death is different, *see* Pet. 15, it is also well-established that evidentiary rules must be stricter in jury trials than in bench ones because juries are more susceptible to unreliable or prejudicial evidence. *See, e.g., Null v. Wainwright*, 508 F.2d 340, 344 (5th Cir. 1975).

The other cases relied on by the Commonwealth all cite *Williams* for other propositions, most notably the uncontroversial proposition that all relevant evidence is generally admissible at capital sentencing hearings. *See* Opp. 15 (citing *Schlup v. Delo*, 513 U.S. 298 (1995); *Dawson v. Delaware*, 503 U.S. 159 (1992); and *Payne v. Tennessee*, 501 U.S. 808 (1991)). While these are capital cases, none of them address the question whether evidence of unadjudicated criminal conduct satisfies the heightened reliability requirement. Indeed, none of them even involve unadjudicated conduct.[1] Thus, none of them have any bearing on this case.

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[1] The Commonwealth's contention that *Tuilaepa v. California*, 512 U.S. 967 (1994), sanctions consideration of unadjudicated conduct is puzzling. *See* Opp. 15. *Tuilaepa* holds that California's use of a "prior criminal activity" aggravating factor is not unconstitutionally vague; it does not address proof issues at all. *See* 512 U.S. at 976-77. Indeed, California is in *conflict* with Virginia on the latter issue. *See* Pet. 12.

In addition to claiming that *Williams* disposes of the argument that unadjudicated-crimes evidence should be excluded altogether, the Commonwealth also claims that *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), precludes the argument that such evidence should at least be proven by a specific standard of proof before the jury may consider it. *See* Opp. 16. Once again, however, *McMillan* is not a capital case, and thus does not address the requirements for such cases.

The Commonwealth also contends that "[n]othing in this Court's precedents" supports the proposition that the prosecution should satisfy a burden of proof with respect to "each fact or piece of evidence." Opp. 10; *see also id.* at 16-17. Not so. First off, not just any "fact or piece of evidence" is at issue. *See* Opp. 10. Instead, this petition addresses evidence of unadjudicated *crimes*, which is especially prejudicial. *Cf.* Fed. R. Evid. 609. Such evidence has particular importance in death penalty cases because it may serve by itself to establish future dangerousness, and therefore death eligibility. This Court has recognized that even in *non-capital* cases, the government may have to prove facts beyond a reasonable doubt if they are so important as to be a "tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88; *see also United States v. Mergerson*, 4 F.3d 337, 343 (5th Cir. 1993). It is all the more important to ensure reliability in *capital* cases.

Requiring the government to prove unadjudicated crimes by a specified burden of proof would help to do so. As this Court has held, "careful instruction on the burden of proof" is a "traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993); *see also, e.g., Addington v. Texas*, 441 U.S. 418, 423 (1979). Thus, several state supreme courts require the government to prove unadjudicated crimes by a specific burden of proof in death cases. *See* Pet. 10, 12-13. These states' longstanding practice shows that this approach is both practical and effective at promoting reliability. Yet Virginia has persisted in applying its

extreme rule of *per se* admissibility – a rule that the great majority of states to consider the issue have rejected. Pet. 10.

III. THIS IMPORTANT QUESTION IS PROPERLY PRESENTED ON THE RECORD OF THIS CASE.

Especially given the importance of this issue, this Court should consider it now. *See* Pet. 21-23. There is no dispute that the jury heard extensive evidence of alleged criminal conduct for which Robin Lovitt was never even tried, much less convicted, and then proceeded to sentence him to death based *solely* on a finding of future dangerousness. *See id.* at 5. Nor does the Commonwealth dispute that the Supreme Court of Virginia alone has affirmed more than 25 death sentences over the past 15 years based on its rule of *per se* admissibility. *See id.* at 21. Thus, this case squarely presents an important and recurring question of federal law. Particularly given that this Court granted *certiorari* to consider a related but much less important procedural issue in *Gray v. Netherland*, 518 U.S. 152 (1996), the Court should now consider the more fundamental question presented here. *See* Pet. 22.

Nonetheless, the Commonwealth attempts to evade review by (1) insinuating that the error was not properly preserved, Opp. 11, (2) claiming that "[t]he facts are not as Lovitt represents," *id.* at 12, and (3) arguing that the error was harmless, *id.* at 13 n.2. None of these claims has merit.

The Commonwealth's waiver argument is notable because the government devotes nearly a full page to arguing that Mr. Lovitt raised this argument in "summary" fashion, Opp. 11, but never actually comes out and says that he failed to preserve the issue. The reason is apparent: Mr. Lovitt did preserve the question by bringing it "to the attention of the state court with fair precision" in both his opening and his reply brief. *See New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); Pet. 8. Given that the Supreme Court of Virginia had already rejected this challenge on more than 20 prior occasions, Mr. Lovitt can hardly be faulted for not belaboring it further. *See*

Pet. 21-22. Indeed, the Commonwealth understood that Mr. Lovitt was presenting the issue – and therefore briefed it in its response brief – and the Supreme Court of Virginia likewise decided the issue in its published opinion. *See id.* at 8. The latter point alone is dispositive, because it is an "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided," as it was here. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (internal quotation omitted).

Besides insinuating waiver, the Commonwealth argues that "[t]he facts are not as Lovitt represents" because the prosecution supposedly introduced "records of institutional due process hearings and findings made of punishable offenses," Opp. 12, and proved other alleged criminal conduct "beyond a reasonable doubt." *Id.* at 13. Not so. The Commonwealth introduced unadorned testimony that Mr. Lovitt had been seen in possession of weapons on multiple occasions in the past – even though it had never made any attempt to convict or otherwise punish him for those alleged felonies. *See* Pet. 6; Va. Code § 18.2-308.2. The Commonwealth also introduced records stating that Mr. Lovitt allegedly engaged in numerous other criminal acts as a juvenile or adult prisoner. *See* Pet. 6. Once again, however, the Commonwealth never made any attempt to convict Mr. Lovitt for those alleged acts, even though they are all crimes, and several of them are felonies.[2]

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[2] *See, e.g.*, Va. Code § 18.2-308.2 (felony for convicted felon to transport concealed weapons); Va. Code § 53.1-203 (felony for prisoner to make or possess weapons or controlled substances); Va. Code § 18.2-55 (felony for prisoner to assault prison employee); Va. Code § 18.2-57 (misdemeanor to commit assault and battery); Va. Code § 18.2-96 (misdemeanor to commit petit larceny); Va. Code § 18.2-477.2 (misdemeanor for juvenile detainee to assault employee of detention center); Va. Code § 18.2-416 (misdemeanor to use violent abusive language); Va. Code § 18.2-251.01 (crime for convicted felon not to enter treatment program after he has been determined to have substance abuse problem).

Instead, the Commonwealth makes much of its claim that Mr. Lovitt supposedly received an "institutional due process" hearing on each of the juvenile detention and prison incidents. *See* Opp. 12-13. This argument fails for three reasons. *First*, even on its own terms, the Commonwealth's contention does nothing to diminish the fact that Mr. Lovitt received no hearing at all on the other incidents, including the weapons-possession incidents. *Second*, a number of the records introduced in evidence reflect only a complainant's allegations; they were never submitted to any hearing, and never led to any discipline. *See, e.g.*, Va. J.A. 2021-26. *Third*, even with respect to those incidents that received some prior hearing, "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Indeed, inmates do not even have the fundamental right to confront the witnesses against them. *See id.* at 567-68. Thus, such hearings do not even attempt to ensure the reliability required for *judicial* purposes, especially *death penalty* purposes.

The Commonwealth is therefore left arguing, in a footnote, that the admission of this evidence was "harmless beyond any reasonable doubt" because the jury also heard evidence that Mr. Lovitt had been convicted of other crimes. Opp. 13 n.2.[3] As explained in Mr. Lovitt's opening brief, and not disputed by the Commonwealth, the harmlessness standard is stringent in this context: reversal is required as long as the death sentence "might" have been influenced by the extensive evidence of unadjudicated crimes. *See, e.g., Arizona v. Fulminante*, 499

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[3] Although the Commonwealth also claims that it "[o]bviously" proved each of the incidents beyond a reasonable doubt, Opp. 13, that contention is both irrelevant and wrong. It is irrelevant because this evidence should not have been admitted at all. It is wrong because with respect to some instances the Commonwealth presented only the unsubstantiated testimony of a single witness, and with respect to the others the Commonwealth relied entirely on hearsay records. *See* Pet. 6-7.

U.S. 279, 302 (1991); Pet. 23. In this case, the Commonwealth presented significantly more evidence of unadjudicated crimes than of adjudicated ones. If believed, this unadjudicated conduct – including assault and battery and possession and manufacture of dangerous weapons – had at least as great a tendency to show future dangerousness, if not more, than the adjudicated conduct, which included petit larceny and possession of marijuana. Presumably for that reason, the Commonwealth not only presented extensive evidence of unadjudicated conduct at trial, but also relied on it heavily during closing argument. *See* Pet. 6-7, 22-23. Having placed so much weight on this evidence before the jury, the Commonwealth can hardly be heard to claim that there is no possibility that it influenced the jury.[4] Accordingly, this important question, on which the courts are divided, is squarely presented on the record of this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

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[4] The harmfulness of this error is further confirmed by the extraordinary result in this case. As Mr. Lovitt explained in his opening brief, Virginia has never executed a person for committing murder during a theft when, as here, there was no evidence that the assailant intended to confront a victim or brought a weapon to the scene. *See* Pet. 23-24. The Commonwealth claims that this point is "ludicrous" because Mr. Lovitt supposedly knew "where the money, scissors and manager were when he planed his robbery and planned to leave no witnesses." Opp. 20 n.6. Significantly, the Commonwealth cites *no* evidence for that allegation, and there is none. The government also claims that *Correll v. Commonwealth*, 352 S.E.2d 352 (Va. 1987), is to the contrary, but that case involved a kidnapping, where the defendant necessarily intended to confront the victim and also told his co-defendants to bring a weapon to the scene. *See id.* at 354. The Commonwealth's willingness to make up facts in this Court serves only to underscore the extraordinary nature of Mr. Lovitt's death sentence, and the likelihood that the unadjudicated crimes evidence made the difference between life and death.

Respectfully submitted,

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